S. HRG. 98-1290

DEPARTMENT OF JUSTICE INVESTIGATION OF FALSE SHIPBUILDING CLAIMS

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AND

SUBCOMMITTEE ON
INTERNATIONAL TRADE, FINANCE, AND
SECURITY ECONOMICS

OF THE

JOINT ECONOMIC COMMITTEE
CONGRESS OF THE UNITED STATES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

EXAMINING THE INTERESTS FOR ALLEGED FALSE CLAIMS IN SHIPBUILDING AND OVERSIGHT REVIEW OF THE DEPARTMENT OF JUSTICE'S INVESTIGATION

OCTOBER 1, 1984

Serial No. J-98-144

Printed for the use of the Committee on the Judiciary and the Joint Economic Committee

U.S. GOVERNMENT PRINTING OFFICE

43-892 O WASHINGTON : 1985

J 841-30
S 521-64

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DEPARTMENT OF JUSTICE INVESTIGATIONS OF FALSE SHIPBUILDING CLAIMS

MONDAY, OCTOBER 1, 1984

U.S. SENATE, SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, COMMITTEE ON THE JUDICIARY; AND SUBCOMMITTEE ON INTERNATIONAL TRADE, FINANCE, AND SECURITY ECONOMICS, JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES,

Washington, DC.

The subcommittees met, pursuant to notice, at 10:40 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles Grassley (chairman of the subcommittee) presiding.

Present: Senators Proxmire and Specter.

Staff present: Lynda Nersesian, chief counsel and staff director; Lisa Hovelson, legislative assistant; Veronica Gonzales, legislative aide; and Richard F. Kaufman, assistant director-general counsel, Joint Economic Committee.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Good morning. The hearing will be in order.

The purpose of today's joint hearings is to examine the interests for examining alleged false claims in shipbuilding and the oversight review of the Department of Justice's investigation into those matters. These interests comport with the jurisdiction of the Judiciary Subcommittee on Administrative Practice and Procedure and the Joint Economic Subcommittee on International Trade, Finance, and Security Economics which have convened here today.

I want to welcome our witness from the Department of Justice, Mr. Stephen Trott, Assistant Attorney General for the Criminal Division.

Mr. Trott, if you will step forward, I will swear you in before you begin. Would you raise your right hand.

[Mr. Trott was sworn as a witness.]

TESTIMONY OF STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE.

Senator GRASSLEY. The Justice Department has been asked to produce various documents referred to in a letter to you, Mr. Trott, from myself and Senator Proxmire, dated August 9, 1984. The Department was notified that if those items were not produced prior to this hearing they would be subpoenaed. Mr. Trott, do you have those documents with you today?

Mr. TROTT. No; I do not, Senator.

Senator GRASSLEY. I would like to commend my good friend and colleague, Senator Proxmire, for his persistence and that of his staff in investigating alleged wrongdoings in Navy shipyards. I also thank the Senator for his cooperation in the ongoing investigation and this hearing.

I would like to have my colleagues present their opening statements at this point. I will start with Senator Proxmire and then Senator Specter.

STATEMENT OF HON. WILLIAM PROXMIRE, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator PROXMIRE. Thank you very much, Mr. Chairman.

Mr. Chairman, first I want to congratulate you on the hard work you have done here, the excellent work you have done. The people in Wisconsin, as well as in Iowa, are gratified at the hard work you have done in trying to get some efficiency out of the Defense Department and to point out some of their very serious shortcomings.

Mr. Chairman, this hearing represents an extension and widening of the Joint Economic Committee's investigation of alleged wrongdoing in Navy shipbuilding. In the hearings I conducted in July, information was presented that lends great weight to allegations of fraud and misconduct made by P. Takis Veliotis against the General Dynamics Corp. Mr. Veliotis is a former general manager of General Dynamics' Electric Boat Division shipyard and a former vice president and director of the corporation. He has been indicted by a New York grand jury for taking kickbacks.

We have now obtained documents that point to possible fraud and misconduct by another shipbuilder, Newport News, and create doubts about the Justice Department's role in the investigation of that firm.

The evidence at the July hearings support allegations that General Dynamics "bought-in" to the 688-class nuclear submarine contracts knowing the costs would exceed its bid, and that it planned to get reimbursement for overruns from the Navy by filing large claims. The documents we have obtained so far suggest that the company concealed facts about the overruns from the Navy. A story in the Washington Post last week indicates that in the early 1980's, the company concealed facts about cost overruns from its own outside auditors. This story provides additional substantiation for the allegations that have been made by Veliotis.

The General Dynamics case is one of a group involving massive claims filed by Navy shipbuilders in the mid-1970's. The Navy settled the claims and paid hundreds of millions of dollars to the shipbuilders despite charges that most of the claims were false or based on fraud.

A number of the claims were referred to the Justice Department but, after protracted investigations they were all dropped with no actions taken. In each instance, the Justice Department issued a terse announcement stating in effect that there was insufficient evidence for a prosecution. The chart on display tells the story of the investigations of three shipyards: Lockheed, Newport News, and General Dynamics.

Mr. Veliotis' allegations and other disclosures made this year raise questions about whether there was evidence of criminal activities and whether the Justice Department missed the evidence in its original inquiry. It is significant that the Justice Department is finally looking into some aspects of the General Dynamics case, although it is not clear how vigorously and wholeheartedly it is looking.

The fact that Attorney General William French Smith chose to set aside his official responsibilities in the General Dynamics case so that he could attend a ship-launching ceremony at the General Dynamics shipyard this past summer does not exactly inspire confidence in the Justice Department's ability to fully investigate this firm.

What about the other shipbuilding investigations? Was there evidence of criminal wrongdoing in those cases? Were those investigations thorough and properly managed? Were the decisions to not prosecute made on the merits of the evidence or were they influenced by political or other considerations?

The fundamental issue here concerns cheating by defense contractors. There have been many disclosures of defense contract abuses and cheating by defense firms. Senator Grassley and I have been involved in some of the disclosures.

When overcharges, overruns, and cheating cross the line into criminal activities, we rely on the Justice Department for protection. The Justice Department is the last bulwark, the final defense against contractor cheating. If the Justice Department fails to carry out its responsibilities to investigate and prosecute defense contractor wrongdoing, the taxpayer in the final analysis has no protection. If the Justice Department doesn't prosecute, that is the end of it as far as the taxpayer is concerned. As far as the defense contractor is concerned, if they prosecute, of course, they go to court and if the court decides against the defense contractors, then they can appeal and if they fail on appeal they can go to the Supreme Court. They have several shots at it. The taxpayer has to rely entirely on the Justice Department.

The issue is not the Navy's claims process or the way contracts are written. The issue is whether the shipbuilders used claims to cheat the Government out of the money it took to cover their cost overruns, and if they did cheat why did the Justice Department fail to do anything? The issue is not whether the Justice Department has instituted a new program to deal with future cases. The issue is how it dealt with the three cases in question.

It is not as important to know that defense contract procedures and Justice Department programs have been changed recently as it is to be assured that cheating can be detected and stopped, by criminal prosecution, if necessary. If cheating has been rewarded in the past, there is no reason to believe it will not succeed next time, despite any new contract provisions or new programs.

Senator Grassley and I wrote in early August to Stephen S. Trott, Assistant Attorney General for the Criminal Division, requesting documents and information on the Lockheed, Newport News, and General Dynamics cases. The Justice Department spent from 3½ years to nearly 5 years investigating each one, and came

up with nothing on each one. Congress and the taxpayer are entitled to know why.

Mr. Trott's reply was to refuse to give us any of the documents we requested, despite the fact that we specifically asked that any grand jury information be deleted, or "redacted," to use the legal term, from the documents. Mr. Trott told us his preliminary analysis of the files covered by our request shows that, and I quote:

> Our files and memoranda on Electric Boat and Newport News are so replete with grand jury material that redactions may well not be feasible.

But we have obtained some documents for the Newport News case that demonstrate otherwise. These documents were prepared by the U.S. attorney's office for the eastern district of Virginia or by attorneys at the main Justice Department. A note attached to the documents from the U.S. attorney's office states, and I quote, "All references to grand jury materials have been carefully deleted." The General Counsel's Office of the GAO has reviewed the documents and concluded that they contain no grand jury materials.

The documents show that six U.S. attorneys or assistant U.S. attorneys who investigated the Newport News case found evidence of criminal violations, recommended that the case be investigated further, or recommended that it be prosecuted. The documents will be made part of the record.

However, we have deleted from them the names of the attorneys who worked on the case and the authors of the documents. We have left in references to political appointees, such as the Attorney General or Assistant Attorney General. Our purpose in this hearing is to try to understand what happened in the investigation and not to criticize the line attorneys and other career officials named in the documents. We would like the focus to be on what happened and whether the Justice Department did its job, rather than on the personalities.

We regret that the Justice Department has not seen fit to cooperate with the subcommittee. It has not given us any of the materials we requested. We hope that this agency, and especially Mr. Trott, will cooperate with us in the future, and that he will go beyond what I understand he has offered to do in the letter he sent to Senator Grassley on Saturday.

Before yielding, I want to quote from three of the documents. The first is from a status report of the Newport News investigation prepared in November 1981 by the U.S. attorney's office in Virginia, and signed by two prosecutors and an attorney from the Criminal Division of the Department of Justice. This 110-page report was sent to the Justice Department. It concluded—and I want to emphasize this conclusion because it is something we should not miss:

> It is clear beyond cavil that the individual claims analyzed above are not only false and without legal merit, but that their preparation was purposeful and criminal.

It goes on to say:

> The conspiracy we have uncovered is staggering in its size and complexity . . . In essence, the yard held the Navy's nuclear shipbuilding program, and hence the national defense, hostage until the Navy agreed to a favorable settlement of its claims. This successful effort to defraud the United States warrants the best effort the Government can muster to bring the yard and its employees to the bar of justice.

That was written in 1981.

The second document I want to quote from is a 16-page report prepared by the U.S. attorney's office for the Justice Department in May 1983. It states—this is also very strong language, and I quote:

> The Justice Department's efforts . . . in this most important case involving perhaps the largest fraudulent assault on the Treasury in the history of the country, were characterized by (a) the lack of accountability for management, direction, and supervision of the case within the Department of Justice, (b) incompetency in the handling of the investigation's earliest stages as a result thereof, (c) constant rotation and reassignment of personnel responsible for the case throughout its protracted history, and (d) lengthy periods during which the case languished from inattention.

Finally, a report signed by U.S. attorney, Elsie Munsell and three other attorneys who work for the Justice Department was sent to Lowell Jensen, then Assistant Attorney General in charge of the Criminal Division. This 28-page report was sent on May 18, 1983, and it says, and I quote:

> We still are convinced that there is a prosecutable case against the company and that an indictment could be put together before October 5, 1983.

The documents indicate two things: (1) that the attorneys and prosecutors who thoroughly examined the evidence found that the claims were false, that Newport News had engaged in a criminal conspiracy, and that a prosecution would be likely to succeed; and (2) that the Justice Department mismanaged its part of the investigation and allowed the case to languish from inattention for long periods of time before finally killing it.

Of course, we have asked to see all the documents and we will need to examine them and question other officials before we can make a balanced judgment of this case. What we have obtained so far obviously suggests some very disturbing conclusions, but there must be tentative conclusions at this time. I am pleased that Mr. Trott is present to answer some of our questions.

At this time, Senator Grassley, I believe our correspondence with Mr. Trott and the documents should be placed in the record. I am also placing in the record a chronology of the Newport News case prepared by the staff.

Senator GRASSLEY. Without objection, the request on the part of the subcommittee is granted.

[Material submitted for the record follows:]

United States Senate

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August 9, 1984

Mr. Stephen S. Trott
Assistant Attorney General
Criminal Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Trott:

Our two Subcommittees are engaged in a review of the government's response to alleged wrongdoings in the Navy shipbuilding industry. As a part of our review, we are requesting information about the Justice Department's management of certain investigations of alleged false shipbuilding claims against the Navy. The investigations we are interested in concern Lockheed, the Electric Boat Division of General Dynamics, and Newport News Drydock and Shipbuilding Company, a subsidiary of Tenneco. Our understanding is that the Lockheed investigation was closed in 1979, Electric Boat in 1981, and Newport News in 1983.

For each of these cases, we request copies of all prosecutors' memoranda, including all recommendations for or against prosecution, all reports and memoranda about the status of the investigations, all reports and memoranda concerning investigative plans, all legal analyses prepared with reference to any of the cases, any dissenting views by one or more of the attorneys with respect to any of the reports and memoranda indicated above, and any other relevant documents or information. In addition, we would like a copy of the report forwarded earlier this year to the Department of Justice by Elsie Munsell, U.S. Attorney for the Eastern District of Virginia, commenting on the 1983 report of the Office of Policy and Management Analysis, Department of Justice, entitled "Review of Navy Claims Investigations," and any other reports and memoranda of the U.S. Attorney's Office dealing with the subject of Navy shipbuilding claims.

We understand that disclosure of evidence or testimony presented to a Grand Jury is prohibited. If any such evidence or testimony is included in any of the materials indicated above, we ask that it be deleted. In this regard, we would like to have a copy of the Department of Justice's guidelines concerning Rule 6(e).

We would like to have this information no later than August 23, 1984.

Your cooperation will be greatly appreciated.

Sincerely,

Chuck Grassley

Senator William Proxmire
Vice Chairman
Subcommittee on International
Trade, Finance, and Security
Economics
Joint Economic Committee

Senator Charles E. Grassley
Chairman
Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

September 7, 1984

Honorable Charles E. Grassley
Honorable William Proxmire
United States Senate
Washington, D.C. 20510

Dear Senators Grassley and Proxmire:

This letter is written in response to your joint request of August 9, 1984, for certain information regarding the Navy shipbuilding industry. We note that your request covers an extraordinarily large amount of material and presents complex and significant questions relating to the critically important and independent prosecutorial function of this Department. This is expecially true due to the fact that one of the areas of your inquiry involves a new investigation. As a result of the scope of your request and these other factors, we unfortunately were not able to consider and assess fully your request within the time period sought in your letter. We apologize for the delay.

At the outset, we state that it is the very strongly held policy view of this Department that prosecution memoranda and internal deliberative documents should not be released outside of the Department. This policy is based on the fundamental need for independent, objective prosecutorial judgments to be made in an atmosphere wherein attorneys are free to express all opinions, weigh and analyze all possibilities openly. Such an atmosphere can only be achieved where the deliberative process is held sacrosanct and is not subjected to subsequent outside evaluation away from the context of prosecutorial evaluation.

Therefore, we must respectfully decline to provide to you any prosecutors' memoranda, any recommendations regarding prosecution, all internal decisional documents relating to the handling of the cases, legal analyses, dissenting views (if any), reports of United States Attorneys about the office of Policy and Management Analysis report. Further, as you acknowledged in your request, Rule 6(e) of the Federal Rules of Criminal Procedure, precludes disclosure of evidence or testimony presented to a grand jury. All such materials must be withheld.

Nevertheless, we have begun a preliminary analysis, of the extensive material which is covered by your request. Already it is clear that our files and memoranda on Electric Boat and Newport News are so replete with grand jury material that redactions may well not be feasible. Although the Lockheed case may not be as completely intertwined with grand jury material, the extent of the materials involved in a full review will require some time to make careful determinations and to perform any necessary excisions. However, we do assure you that our efforts in this regard are underway and we will keep you advised of our progress through our Office of Legislative and Intergovernmental Affairs. In this regard, you might wish to note that the Government Accounting Office has also asked for other specific information about these cases and we are contemporanecusly working to comply with that request to the extent possible.

At your request, we are including with this letter a copy of our guidelines on Rule 6(e).

Sincerely,

Stephen S. Trott

Enclosure

cc: Robert A. McConnell

United States Senate

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September 18, 1984

Mr. Stephen S. Trott
Assistant Attorney General
Criminal Division
U.S. Dept. of Justice
Washington, D.C. 20530

Dear Mr. Trott:

On August 9, 1984 we requested you supply us by August 23, 1984 specific information about the Justice Department's management of certain investigations of alledged false shipbuilding claims against the Navy involving Lockheed, the Electric Boat Division of General Dynamics, and Newport News Drydock and Shipbuilding Company. We also acknowledged the prohibition against disclosure of evidence or testimony presented to a Grand Jury and asked that any such material be deleted.

Your September 7, 1984 response indicated you would not comply with our request because the extensive documents in at least two of the three cases were "so replete with Grand Jury material that reductions may well not be feasible." You also stated that DOJ has a "very strongly held policy" that "internal deliberative documents should not be released outside of the Department."

Review of judicial practices falls under the jurisdiction of the Senate Judiciary Committee and the Subcommittee on Administrative Practice and Procedure has jurisdiction over the False Claims Act. Accordingly, we request your presence to testify in a joint hearing before the Administrative Practice Subcommittee and the Subcommittee on International Trade, Finance, and Security Economics of the Joint Economic Committee on October 1, 1984, at 10:30 a.m. Your testimony should focus on the Department's handling of false claims investigations in general, and particularly as it relates to the cases mentioned in our August 9, 1984 letter. In addition to your testimony, you are requested to bring all documents as identified in the aforementioned August 9 letter.

Your timely response and compliance would be most appreciated.

Sincerly,

Charles E. Grassley
U.S. Senator

William Proxmire
U.S. Senator

CEG:lhg

cc: Robert McConnell

United States Senate

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ALICE R. MILDER, GENERAL COUNSEL

September 23, 1984

Mr. Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs
Department of Justice
Washington, D.C 20530

Dear Mr. McConnell:

You have arranged a meeting with me in my office, SH-135, on September 24 at 4:30 p.m. in regard to my request for certain documents from the Department of Justice and the related hearing scheduled October 1, 1984.

The Department has already refused to comply with the original request for materials relating to management of certain investigations of alleged false shipbuilding claims against the Navy involving Lockheed, the Electric Boat Division of General Dynamics, and Newport News Drydock and Shipbuilding Company. When you meet with me tomorrow, could you produce a list specifying and identifying the documents contained in your files on each of these cases, their dates, and the specific reason the Department objects to their disclosure to this subcommittee.

In the September 7, 1984 letter from Stephen Trott, he indicated the Department had begun an analysis of the material requested. I am also aware that the Government Accounting Office has been assured by the Department that a summary of all documents relating to these three investigations will be provided to them by October 1, 1984. I therefore trust that this request for a listing can be accommodated.

Thank you for your cooperation on this matter.

Sincerely,

Chuck

Charles E. Grassley
Chairman, Subcommittee on
Administrative Practice & Procedure

Thanks for your co-operation!

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

September 28, 1984

The Honorable Charles E. Grassley
United States Senate
Washington, DC 20510

Dear Senator Grassley,

I am sorry that you declined to meet with me or the Associate Attorney General today to discuss the intentions of the Department of Justice with respect to the hearing before the Administrative Practice Subcommittee on International Trade, Finance, and Security Economics of the Joint Economic Committee on October 1, 1984, which you have asked me to attend. Had you met with me, I would have advised you that I have reconsidered your request for the documents you have requested in connection with this hearing and determined upon reflection that the materials that you have identified on two of these matters--subject, of course, to the restrictions of Rule 6(e) of the Federal Rules of Criminal Procedure prohibiting disclosure of grand jury material--shall be made available to you for your use and consideration.

What I wanted to discuss with you was the procedure by which this delicate process can appropriately be accomplished.

As I indicated to you in my letter of September 7, 1984, the paperwork, documents, memoranda, and deliberative material on the Newport News case are replete with grand jury material. The case itself involves an estimated 250,000 documents and 6,000 pages of grand jury transcripts. At various times, 15 lawyers worked on the case and contributed to the memoranda. Under the circumstances, sorting out grand jury material from non-grand jury material has turned out to be an arduous and a difficult process, especially since many of the contributors to the files no longer work for the Government. In many instances, decisions as to whether something is grand jury material have been simple, and that information can be made available to you. In other instances, however, the issues are not at all clear. I am advised by lawyers on my staff that a resolution of these issues by a court is imperative before we can fully respond to your request. For our protection, for yours, and most importantly in the interest of following the law and respecting the rights of those who were under scrutiny in the grand jury process, we have determined that a Motion for Supervision and Guidance in this uncertain area shall be filed as quickly as possible in the appropriate federal district court. It is the federal court that supervises this process, and to avoid possible errors that might result in a contempt of court, I believe this is the appropriate vehicle to resolve these issues.

We will, of course, respect the final judgment of the court and make available to you on the Newport News case any material that is not guarded by Rule 6(e).

There is ample precedent for taking this course of action. In the case of In re Grand Jury Empanelled October 2, 1978, 510 F.Supp. 112 (1982), such a motion was made, and the court expeditiously issued an appropriate order. I have included with this letter a copy of the court's opinion for your examination along with additional material from the United States Attorney's Manual discussing the ramifications of Rule 6(e).

Obviously, this process will involve the careful redacting of documents under the guidance of the court. We are prepared to do this even though it will divert the attention of our Fraud Section attorneys away from active investigations on other important cases. Let me indicate in this regard that Newport News is a case that was closed over a year ago and that the statute of limitations has long since expired, making impossible any prosecution at this late date. The case itself deals with requests for proposals that were issued in 1969, contracts that were let in 1971, claims that were filed against the Navy in 1975, and a settlement nearly six years ago in the fall of 1978. I have been advised by GAO that they have turned over to Senator Proxmire some of the memoranda that exist in this case. Those memoranda standing alone may give you a false and misleading impression of the effort put forth by the Department of Justice on this matter and the reasons for which prosecution was declined. When you see the entire picture, it is my expectation that you will understand and appreciate the reasons why this case could not go forward.

I also wanted at our meeting to impress upon you the difficulty and the frustration of working with redacted documents. When you get the final product, whole pages, paragraphs, and sentences will be missing in a way that could create very misleading impressions. To the extent allowed by law, we hope to be able to augment your understanding of this case through oral briefings.

The Lockheed case will not be as difficult to resolve because of the comparative lack of grand jury material contained therein. However, because of the time that we have been spending on Newport News and General Dynamics/Electric Boat, we are not yet in a position to be able to give you access to any of the documents. However, it will be a priority to review these documents and to make them available to you as soon as possible. In this connection, we have also been hard at work answering the questions put to us by GAO on behalf of Senator Proxmire. We are filing with GAO today our submission in this regard, meeting the deadline of October 1, 1984.

The third case--General Dynamics/Electric Boat--provides us with an entirely different problem. As you undoubtedly know, although the statute of limitations has run on the original claims, and the case been closed, the investigation has been vigorously reopened on a different but directly related basis. Because the case has been reopened, Rule 6(e) and its interpretation by the courts even prohibit me from advising you of the precise basis on which it has been reopened.

For a variety of reasons relative to the integrity of the law enforcement process, the Department does not release any material that relates to open investigations that are actively being pursued before a grand jury. Such a release may jeopardize the integrity of the investigation, impede its progress, scare off witnesses, cause the destruction of evidence, and interfere with the constitutional and statutory rights of the people involved. Just as soon as General Dynamics/Electric Boat is no longer in this sensitive and delicate posture, however, we of course will be in an entirely different position and will be able willingly to go through the same process of making available material to you that I described earlier in this letter with respect to Newport News. In effect, we are acceding to your request for information, but we are advising you that the actual delivery of that information must wait until a later date.

I had also hoped at the meeting that I would be able to discuss with you the policy that the Department of Justice normally follows in situations such as this of not releasing internal information to anyone. This policy is based on the fundamental need for independent, objective prosecutorial judgments to be made in an atmosphere where attorneys are free to express all opinions and to weigh and analyze all possibilities openly. Such an atmosphere can only be achieved where the deliberative process is protected from the inhibiting effects of subsequent evaluation away from the context of prosecutorial consideration. It was my hope that I would be able to discuss with you to the reasons for this policy and to convince you that its indiscriminate violation can have serious negative effects on the ability of the Department to conduct business. Because of your manifest concern for the importance and sensitivity of the prosecutorial process, I am confident that if we could discuss this issue, we would be able to work out a way to handle these documents in a manner that will preserve both of our legitimate interests in this regard.

In closing, I am looking forward to my appearance before your Committee at 10:30 a.m. on Monday, October 1, 1984. I am certain that working together we can properly pursue and advance our respective institutional responsibilities.

Sincerely,

Stephen S. Trott

Attachments

INVESTIGATIONS OF ALLEGED FALSE SHIPBUILDING CLAIMS

Company	Contract Awards	Types of Ships	Dates of Claims	Amounts of Claims	Amount Paid by Navy	Referred To Justice By Navy	Justice Department Action
Lockheed	1963 1964 1965	. Destroyer Escorts . Amphibious Transport Dock Vessels	1968-1969	$160 million	$ 62 million	December 1974	Declined October 1979
Newport News	1967-1974	. Nuclear Submarines . Cruisers . Aircraft Carriers	1975-1976	$894 million	$208 million	February 1978	Declined August 1983
General Dynamics	1971 1973	Nuclear Submarines	1976-1977	$843 million	$634 million	February 1978	Declined December 1981

CHRONOLOGY OF NEWPORT NEWS INVESTIGATION

1975-1976	Newport News files cost overrun claims against the Navy totaling $894 million on contracts for the construction of seven nuclear submarines, five cruisers, and two aircraft carriers. It threatens to stop work on the ships if the claims are not satisfactorily settled.
June 7, 1976	Joint Economic Committee holds hearings on Newport News claims, receives testimony from Admiral Rickover and Robert Cardwell, a former Newport News official.
June - July 1976	Senator Proxmire writes Navy and Justice Department requesting probes into possible fraud in the Newport News claims based on allegations of Rickover and Cardwell and examination of claims documents.
August 1976	Justice Department tells Proxmire Fraud Section is evaluating his request.
1977-1978	Admiral Rickover notifies superiors of numerous items of possible fraud in the Newport News claims.
February-March 1978	Navy refers Newport News claims to Justice for investigation.
1978	Justice Department opens investigation of claims, sharing responsibility for the work between main Justice and U.S. Attorney for Eastern District of Virginia.
Summer 1978	Richmond prosecution team begins work. Team composed of attorneys from U.S. Attorney's Office, Criminal Division of Justice Department, and Navy.
October 1980	Richmond prosecutor recommends prosecution be declined. U.S. Attorney rejects recommendation and moves inquiry from Richmond to Alexandria office.

January 1981	U.S. Attorney Justin W. Williams determines that Richmond investigation was inadequate and decides with approval of Justice Department to continue investigation.
March 1981	Newport News files motion with Richmond Federal court to terminate grand jury investigation. Court rules against Newport News but criticizes government attorneys for "foot-dragging."
November 1981	Status report from U.S. Attorney's Office and Criminal Division, Department of Justice, concludes the claims are false and comprise a conspiracy to defraud the government. The report recommends the investigation be concluded by Spring or Summer 1982 so that statute of limitations does not expire on the substantive counts.
November 1981	Justice Department shifts complete responsibility for staffing and prosecution of the case to the U.S. Attorney's Office.
Spring 1982	Criminal Division of Justice Department directs a review of U.S. Attorney's conclusions contained in the November 1981 status report.
August 1982	Justice Department review agrees with November status report and recommends that investigation continue with emphasis on the claims effort as a conspiracy to obstruct, impede, and delay the lawful function of government and the orderly claims process.
September 1982	Author of August 1982 review is assigned to revitalize the Newport News investigation. He transmits a work plan to the Fraud Section of the Justice Department.
Spring 1983	Fraud Section of Justice Department sends report to D. Lowell Jensen, Assistant Attorney General, recommending the investigation be halted.

May 1983 — U.S. Attorney's Office sends a 16-page report to the Justice Department refuting Fraud Section report, stating that the only reason for stopping the investigation would be that prosecution might be barred by the statute of limitations, and arguing that the investigation was characterized by poor supervision by the Department of Justice incompetency in the earliest stages, constant rotation and reassignment of personnel, and inattention.

May 18, 1983 — U.S. Attorney Elsie L. Munsell, two assistant attorneys from her office, and an attorney from the Justice Department Criminal Division send a report to Assistant Attorney General Jensen critiquing the Fraud Section report, and stating that there is a prosecutable case against Newport News and that a two-count indictment charging the company with conspiracy to defraud the government could be quickly drafted.

August 30, 1983 — Associate Attorney General Lowell Jensen writes Navy General Counsel Walter T. Skallerup that criminal prosecution is not possible.

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Washington, D.C. 20540

September 18, 1984

TO : Senate Judiciary Committee
Administrative Practice and Procedure Subcommittee
Attention: Lisa Hovelson

FROM : American Law Division

SUBJECT: Committee Access to Department of Justice Records

This memorandum briefly sets forth arguments for committee access to documents from the Department of Justice.

Both the Joint Economic Committee and the Senate Judiciary Committee, through subcommittee chairmen, have requested information on the Justice Department's handling of certain investigations of alleged false shipbuilding claims made by Navy contractors. The cases--involving Lockhead, General Dynamics and Newport News Drydock and Shipbuilding Company--were closed in 1979, 1981 and 1983, respectively, with no charges brought. Documents sought include all prosecutors' memoranda, reports and memoranda on the status of and plans for the investigation, all legal analyses, and "any other relevant documents or information." Also requested are a copy of a report prepared by the United States Attorney for the Eastern District of Virginia commenting on a Department of Justice Office of Policy and Management Analysis review of Navy claims investigations as well as any other relevant reports and memoranda from the United States Attorney's Office. The committees specifically disclaimed interest in material protected by Federal Rule of Criminal Procedure 6(e) (matters occurring before a grand jury).

The Department replied on September 7, 1984, denying access to the bulk of the documents requested by the committee:

> At the outset, we state that it is the very strongly held policy view of this Department that prosecution memoranda and internal deliberative documents should not be released outside of the Department. This policy is based on the fundamental need for independent, objective prosecutorial judgments to be made in an atmosphere wherein attorneys are free to express all opinions, weigh and analyze all possibilities openly. Such an atmosphere can only be achieved where the deliberative process is held sacrosanct and is not subjected to subsequent outside evaluation away from the context of prosecutorial evaluation.

> Therefore, we must respectfully decline to provide to you any prosecutors' memoranda, any recommendations regarding prosecution, all internal decisional documents relating to the handling of the cases, legal analyses, dissenting views (if any), reports of United States Attorneys about the Office of Policy and Management Analysis report. Further, as you acknowledged in your request, Rule 6(e) of the Federal Rules of Criminal Procedure precludes disclosure of evidence or testimony presented to a grand jury. All such materials must be withheld.

The Department also noted that one of the cases involved a "new investigation" thereby rendering the access request more sensitive. However, the "new investigation" apparently does not represent a reopening of one of the false claims cases but rather an inquiry into possible obstruction of justice or other peripheral wrongdoing allegedly flowing from the original investigation. Thus, all three cases on which the committees are seeking information are apparently closed and the statute of limitations likely renders the reopening of at least some of them unlikely.

The information request involves the operations and management of the Department of Justice and the agency investigation of alleged violations of criminal laws. Such subjects are within the jurisdiction of the Judiciary Committee. Furthermore, the committee inquiry involves not only oversight of department actions but also investigation of the need for reform of the laws involved in the transactions being studied. The Department itself, in the review of Navy claims investigations prepared by the Office of Policy and Management Analysis, identified changes in the laws that in its view would facilitate resolution of claims and criminal prosecutions of law violators. The committees, therefore, have demonstrated need for the documents and a link between the documents sought and the subject of inquiry and a legitimate legislative purpose within committee jurisdiction. See, Watkins v. United States, 354 U.S. 178 (1957); United States v. A.T. & T., 551 F.2d 384, 393 (D.C. Cir. 1976) (need for establishing legislative purpose and jurisdictional requisites).

The committees' inquiry into the handling of particular cases also is similar in many respects to that involved in McGrain v. Daugherty, 273 U.S. 135 (1927), a leading case on the congressional investigatory power. There, the Supreme Court upheld compulsory process directed to a brother of the Attorney General in the course of a committee investigation into the operations and prosecutorial policies of the Department of Justice. It held that "the power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function," 273 U.S. at 174, and went on to describe the legitimacy of the committee's endeavor:

> It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice--whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.
>
> 273 U.S. at 177-8.

The Senate resolution authorizing the committee investigation is also instructive and was quoted by the Court in the course of upholding the validity of the investigation:

> ...to investigate circumstances and facts, and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Anti-trust Act and the Clayton Act against monopolies and unlawful restraint of trade; the alleged neglect and failure of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E.L. Doheny, C.R. Forbes, and their co-conspirators in defrauding the Government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute many others for violations of Federal statutes, and his alleged failure to prosecute properly, efficiently, and promptly, and to defend, all manner of civil and criminal actions wherein the Government of the United States is interested as a party plaintiff or defendant. And said committee is further directed to inquire into, investigate and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice which would in any manner tend to impair their efficiency or influence as representatives of the Government of the United States.
>
> 273 U.S. at 151.

Despite the breadth of the committee's investigatory mandate, the Court had little trouble finding a legitimate legislative focus for the inquiry. The document request here, on the other hand, involves a much more modest inquiry directed to a particular class of recent, closed cases. Alleged nonfeasance or malfeasance of executive officers is not the primary focus of investigation. Rather, flaws in the statutes and breakdowns in the management and operation of certain types of cases are the committees' concerns. Therefore, the McGrain umbrella would seem to encompass this investigation and the document request pursuant thereto.

It is also significant that the inquiry is not so much concerned with the outcomes of particular cases or with second-guessing specific prosecutorial de-

cisions (although such an inquiry may be entirely legitimate) as with the handling of a group of cases and the characteristics of these cases that influenced their outcome as a class. Attorney General Bell made this distinction during 1977 hearings on the internal investigation policies of the Department:

> I think this is a function [examining exercises of prosecutorial discretion by the Department] that could be abused by Congress. If you started calling me every day, wondering about what happened to some prosecution in St. Louis and another in New York. But if you wanted to come in and take a group of 100 and study them, then you would be engaged in oversight. So there is a fine line between the two, and I don't think you would ever abuse your power to engage in oversight in the way I am talking about.
>
> ...
>
> So you get to asking about details about a particular case: How do you reach this conclusion? What was the basis of your discretion? I think the oversight function can be well performed by studying groups of cases and often by just studying status of cases. But to the extent you need to go further than that, I am willing to cooperate.

Hearings on Justice Department Internal Investigation Policies Before a Subcomm. of House Comm. on Government Operations, 95th Cong., 1st Sess. 59 (1977).

The committees' investigation would seem to conform to what Attorney General Bell deemed to be legitimate oversight, namely, inquiry as to the handling of a group of cases. While frequently resistant to the disclosure of internal documents and investigatory records, the Department has in the past shared what it views as "enforcement sensitive" documents with congressional committees. The most notable recent instance of such committee access involved superfund enforcement files (many of which concerned open cases) from the Department and the EPA, albeit gained only after a contempt citation. The committee's report on the superfund investigation concluded that the agency claims of sensitivity had been exaggerated in many cases. Comm. Print 98-AA, 98th Cong., 2d Sess. 30 (August 1984). The report also recounted past examples of the Department sharing similar information with congressional committees. Id., 56-68. These access arrangements often involved committee pledges to honor the confidentiality of the information.

The Department's September 7 response merely pointed to its "policy view" that the requested documents should not be disclosed outside the Department. No claims of privilege or prejudice to ongoing cases have been made. Even with respect to such claims, however, it is not clear that courts would necessarily uphold the executive's claims in the face of a congressional demand. See, United States v. A.T. & T., 567 F.2d 121 (D.C. Cir. 1977) (recognizing congressional prerogatives

even with respect to national security information); CRS Report, Congressional Inquiries into Matters that are the Subject of Civil or Criminal Cases, March 10, 1983 (attached). Regardless, Congress possesses tools to influence the resolution of information access disputes short of litigation, such as the subpoena, threatened or actual contempt citation, or devising compromises involving the safeguarding of sensitive data.

Richard Ehlke
Specialist in American
Public Law
American Law Division
September 18, 1984

1033 (N.D.Tex.1980) (plastic bags). For this reason, Goshorn's expectation of privacy in the container was significantly greater than that of a defendant whose container reveals its contents by its shape or feel. *See Robbins v. California*, 103 Cal.App.3d 34, 162 Cal.Rptr. 780 (1980), *cert. granted*, —— U.S. ——, 101 S.Ct. 916, 66 L.Ed.2d 838 (1981); *United States v. Portillo*, *supra*, 633 F.2d at 1320; *United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980). *See also Arkansas v. Sanders*, *supra*, 442 U.S. at 764–765 n.13, 99 S.Ct. at 2593–2594.

Finally, the fact that Keefe found the container in a trunk which also contained loose clothing suggested that the container had been "pressed into service as a repository for [Goshorn's] personal effects." *United States v. Ross*, *supra*, at —— n.6. Therefore, even if a container made of paper and plastic bags is not invariably viewed as a repository for one's personal effects, the circumstances apparent to Keefe at the time of this search indicated that Goshorn might be using the container for this purpose.

In view of the foregoing, I conclude that Goshorn has established that he had a legitimate expectation of privacy in the container at the time of the search. As in my original decision, I reject the government's further argument that the search was nonetheless justified as an inventory pursuant to *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). *See United States v. Ocampo*, 492 F.Supp. 1211, 1234 (E.D.N.Y.1980); *United States v. Hill*, 458 F.Supp. 31 (D.D.C.1978); *United States v. Vallieres*, 443 F.Supp. 186, 191 (D.Conn. 1977); *United States v. Cooper*, 428 F.Supp. 652, 654 (S.D.Ohio 1977).[3] Since Goshorn had a legitimate expectation of privacy in the container searched, and since the search was conducted without a warrant and does not fall within an exception to the warrant requirement, Goshorn's motion to suppress is allowed.

3. However, I have not reconsidered this issue in this memorandum since this aspect of my original decision was neither affected by *United States v. Salvucci*, *supra*, nor addressed by the Court of Appeals in this case. Moreover, the government has not pointed to any new case law which alters my view.

In re GRAND JURY IMPANELLED OCTOBER 2, 1978 (79–2).

Misc. No. 81–0059.

United States District Court, District of Columbia.

March 9, 1981.

The Department of Justice filed motion seeking guidance on applicability of federal rule of criminal procedure governing grand jury secrecy to request of Senate Subcommittee on Improvement in Judicial Machinery for access to various DOJ files to enable it to fulfill its task or examining DOJ's public integrity section's investigation of certain individual. The District Court, Bryant, Chief Judge, held that: (1) subcommittee was entitled to disclosure of certain financial and hotel records, DOJ analyses of those records, and articles of incorporation for certain corporation; (2) subcommittee was not entitled to inventory of all documents subpoened by grand jury; and (3) subcommittee was entitled to disclosure of memoranda and recommendations prepared by DOJ, as redacted by DOJ so as not to reveal what actually occurred before grand jury.

Order accordingly.

1. Grand Jury ⇐41

Senate Subcommittee on Improvements in Judicial Machinery, which was examining public integrity section's investigation of certain individual, was entitled to disclosure of certain financial and hotel records; records were not shielded simply because some of them were seen by grand jury. Fed.Rules Cr.Proc. Rule 6(e), 18 U.S.C.A.

2. Grand Jury ⇐41

Senate Subcommittee on Improvements in Judicial Machinery, which was examining public integrity section's investigation of certain individual, was entitled to disclosure of section's analyses of certain financial and hotel records, even though those records had been seen by grand jury, since Subcommittee was looking into section's performance and not grand jury itself. Fed.Rules Cr.Proc. Rule 6(e), 18 U.S.C.A.

3. Grand Jury ⇐41

Senate Subcommittee on Improvements in Judicial Machinery, which was examining public integrity section's investigation of certain individual, was entitled to disclosure of articles of incorporation of certain corporation, since articles fell into category of specifically designated documents that preexisted grand jury and were not protected merely because they were shown to grand jury. Fed.Rules Cr.Proc. Rule 6(e), 18 U.S.C.A.

4. Grand Jury ⇐41

Senate Subcommittee on Improvements in Judicial Machinery, which was examining public integrity section's investigation of certain individual, was not entitled to inventory of all documents subpoened by grand jury, even though subcommittee was seeking inventory "for its own sake," rather than to discover what occurred before grand jury, since producing such inventory would inevitably set dangerous precedent by revealing great deal about scope and focus of grand jury's investigation. Fed. Rules Cr.Proc. Rule 6(e), 18 U.S.C.A.

5. Grand Jury ⇐41

Senate Subcommittee on Improvements in Judicial Machinery, which was examining public integrity section's investigation of certain individual, was entitled to disclosure of memoranda and recommendations prepared by Department of Judiciary, but Department was entitled to redact memoranda and recommendations, removing only those parts that contained transcripts of grand jury testimony or account of what actually occurred before grand jury. Fed.Rules Cr.Proc. Rule 6(e), 18 U.S.C.A.

Michael Davidson, Senate Legal Counsel, Paula A. Sweeney, Asst. Senate Legal Counsel, for plaintiff.

John Keeney, Deputy Asst. Atty. Gen., Charles F. C. Ruff, U. S. Atty., District of Columbia, Washington, D. C., for defendant.

MEMORANDUM AND ORDER

BRYANT, Chief Judge.

The Senate Committee on the Judiciary (Committee) has legislative and oversight responsibility for the Department of Justice (DOJ). The Committee is charged by Senate Rules with the responsibility for examining the application, administration and execution of those laws, or parts of laws within the Committee's legislative jurisdiction.[1] In addition, the Crime Control Act of 1976[2] requires that Congress provide legislative authorization for all DOJ appropriations. As part of its general oversight responsibilities the Committee has paid particular attention to the DOJ's Public Integrity Section. On July 23, 1980, the Committee charged the Senate Subcommittee on Improvements in Judicial Machinery (Subcommittee) with the task of examining the Public Integrity Section's investigation of Robert L. Vesco.

In the spring of 1980 the entire Committee requested access to various DOJ files to enable it to fulfill its oversight responsibilities. Attorney General Civiletti informed Senators Kennedy and Thurmond on June 23, 1980 that many DOJ files would be available, but certain administrative problems remained to be ironed out with respect to files in five cases, including the Vesco case. After a lengthy exchange of correspondence the Subcommittee charged with oversight of the Vesco investigation re-

1. Senate Standing Rule XXVI(8)(a).

2. Pub.Law No. 94-503 § 204, 90 Stat. 2427.

quested the DOJ to provide access to seven groups of Vesco investigation documents: (1) American Express records; (2) hotel records; (3) DOJ analyses of American Express records; (4) DOJ analyses of hotel records;[3] (5) Articles of Incorporation for Southern Ventures; (6) an inventory of all documents subpoenaed by the grand jury and (7) memoranda and recommendations prepared by the DOJ.[4]

The DOJ balked at providing access to these Vesco records and on November 24, 1980 filed a motion with this court seeking guidance on the applicability of Federal Rule of Criminal Procedure 6(e) to the Subcommittee's request. On December 24, 1980 the Subcommittee filed an amicus curiae brief opposing the Department's interpretation of Rule 6(e).

Rule 6(e) provides in part that no one shall "disclose matters occurring before the grand jury, except . . . when so directed by a court preliminarily to, or in connection with a judicial proceeding." If a document at issue does not "disclose matters occurring before the grand jury" it does not fall under the protection of Rule 6(e). If the document does make such a disclosure the court is called upon to determine whether the party seeking the document does so "in connection with a judicial proceeding" and whether the party has demonstrated a particularized need for the document. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 217–23, 99 S.Ct. 1667, 1672–1675, 60 L.Ed.2d 156 (1979).

Since the Subcommittee's general oversight proceedings do not constitute a "judicial proceeding," *In re Grand Jury Investigation of Uranium Industry*, 1979–2 Trade Cases (CCH) ¶ 62,798 at pp. 78,639; 78,643–78,644 (D.D.C. August 16, 1979), if a category of documents fall under Rule 6(e) the court need not proceed to examine any particularized need for the documents and the Subcommittee's request for that category of documents must therefore fail.

Rule 6(e)'s prohibition against "disclos[ing] matters occurring before the grand jury" is deceptive in its simplicity. The courts have generally agreed that transcripts or any account of what actually occurred before the grand jury falls under the protection of Rule 6(e).[5] The controversy stems from various attempts to block access to documents that were subpoenaed for and/or presented to the grand jury. In the seminal case in this area Chief Judge Lumbard held that

> . . . when testimony or data is sought for its own sake—for its intrinsic value in furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same documents had been, or were presently being, examined by a grand jury. [*United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2nd Cir. 1960).]

Thus, when the Committee sought Uranium investigation documents in 1979 this court held that the mere fact that these documents had also been revealed to the grand jury did not make them protected by Rule 6(e). *In re Grand Jury Investigation of Uranium Industry*, *supra* at 78,642.

At the same time, in evaluating 6(e) requests the courts have been sensitive to the need for grand jury secrecy. If permitting a document that is part of a grand jury investigation to be released would encour-

3. Initially, the Subcommittee asked for only those American Express records and hotel records subpoenaed by the grand jury on certain specific days. This was later modified to include all American Express and hotel records accumulated by the DOJ in the process of its investigation. Letter of November 13, 1980 from Michael Davidson, Esq. to the Honorable John C. Keeney, Deputy Assistant Attorney General. *See* Memorandum of the Department of Justice concerning the Applicability of Rule 6(e) to the Requests of the Senate Subcommittee on Improvements in Judicial Machinery for Disclosure of Documents (Memorandum of DOJ) at A-20.

4. Letters of October 21, 1980 and October 22, 1980 from Michael Davidson, Esq. to the Honorable John C. Keeney, Deputy Assistant Attorney General. *See* Memorandum of DOJ at A-16 & A-19.

5. *See* discussion in *In re Grand Jury Investigation of Uranium Industry*, *supra*.

age the flight of suspects or jury tampering or subornation of perjury or discourage persons with information from coming forward or harm the innocent[6] the courts will no doubt give careful thought to the application of Rule 6(e).

To summarize, the courts have developed two basic rules of thumb in the 6(e) area: first, documents sought for their own sake are not protected by Rule 6(e) merely because they were subpoenaed by or shown to the grand jury; and, second, documents the disclosure of which would reveal what actually occurred before the grand jury and would thus frustrate the purpose of grand jury secrecy are governed by Rule 6(e).

[1-3] Applying the above to the seven categories of documents requested by the Subcommittee,[7] the court concludes that only the inventory of all documents subpoenaed by the grand jury and those parts of the DOJ memoranda that reveal what actually occurred before the grand jury fall under the protection of Rule 6(e). The American Express and hotel records should not be shielded simply because some of those records were seen by the grand jury. The analyses of these records presents a closer question since the Department states that the analyses were prepared by the FBI for the grand jury's use and did not pre-exist the grand jury. Memorandum of DOJ at 12. Since the Subcommittee is looking into the Public Integrity Section's performance and not the grand jury itself, these record analyses would seem to fall into that category of unprotected documents that have a significance of their own—here as part of the Public Integrity Section's investigation of Robert Vesco. The court therefore holds that the analyses of the American Express and hotel records are not protected by Rule 6(e). The court concurs in the DOJ's view that the Articles of Incorporation for Southern Ventures falls into that category of specifically designated documents that pre-exist the grand jury and are not protected by Rule 6(e) merely because they were shown to the grand jury.[8]

[4] Although the scope of Rule 6(e) is by no means self-evident, the court has concluded that the Subcommittee's request for an inventory of all documents subpoenaed by the grand jury falls within that scope. The Subcommittee is undoubtedly seeking this inventory "for its own sake"—to learn more about the Public Integrity Section's conduct—and not to discover what occurred before the grand jury. But the court shares the DOJ's concern that producing such an inventory will inevitably set a dangerous precedent by revealing a great deal about the scope and focus of the grand jury's investigation. *Securities & Exchange Com'n v. Dresser Indus.*, 628 F.2d at 1382 (purpose of 6(e) is, *inter alia*, to protect the strategy or direction of the grand jury investigation); *United States v. Stanford*, 589 F.2d 285, 291 n.6 (7th Cir. 1978) (dictum), *cert. denied*, 440 U.S. 983, 99 S.Ct. 1794, 60 L.Ed.2d 244 (1979); *Davis v. Romney*, 55 F.R.D. 337, 341-42 (E.D.Pa.1972) (dictum). The court therefore reluctantly concludes that an inventory of all documents subpoenaed by the grand jury "disclose[s] matters occurring before the grand jury" and is protected by Rule 6(e).[9]

[5] Finally, the matter of the DOJ's own Vesco memoranda and recommendations must be resolved. The Subcommittee

6. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10, 99 S.Ct. 1667, 1673 n.10, 60 L.Ed.2d 156 (1979).

7. *See* pp. 113-114, *supra*.

8. *Securities & Exchange Com'n v. Dresser Indus.*, 628 F.2d 1368, 1382-84 (D.C.Cir.) (en banc) ("The fact that a grand jury has subpoenaed documents concerning a particular matter does not insulate that matter from investigation in another forum."), *cert. denied*, — U.S. —, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980).

9. Nothing in the court's opinion is intended to preclude the Subcommittee from seeking from the DOJ an inventory of *all* Vesco documents in the Department's files including documents received as a result of grand jury subpoenas. As long as the Department does not segregate those documents that were subpoenaed by the grand jury such an inventory should in no way infringe on grand jury secrecy or call Rule 6(e) into play.

acknowledged in its request that passages of these memoranda would reveal matters occurring before the grand jury and can therefore be deleted.[10] The Department responds that after making all the necessary deletions the memoranda would be unintelligible. Memorandum of the DOJ at 12. Having been immersed in Freedom of Information Act and national security cases, this court can indeed commiserate with litigants mired in heavily redacted documents. But it is for the Subcommittee and not the Department to determine what is and what is not of value to the Subcommittee oversight function. The Department should carefully redact the memoranda and recommendations, removing only those parts that contain transcripts of grand jury testimony or an account of what actually occurred before the grand jury.[11] The court therefore,

ORDERS that the Subcommittee on Improvements in Judicial Machinery's request for release of an inventory of all documents subpoenaed by the Vesco grand jury be denied; and it

FURTHER ORDERS that the Department of Justice disclose to the Subcommittee on Improvements in Judicial Machinery all Vesco American Express and hotel records, the analyses of those records and the Articles of Incorporation for Southern Ventures; and it

FURTHER ORDERS that the Department of Justice disclose to the Subcommittee on Improvements in Judicial Machinery within thirty days of the date of this order memoranda prepared by it which relate to its investigation of Robert Vesco and recommendations made by it concerning the Vesco case, including whether to use a special prosecutor and/or seek an indictment, with those parts of the memoranda and recommendations that contain transcripts of grand jury testimony or any account of what actually occurred before the grand jury redacted; and it

FURTHER ORDERS that the Department of Justice provide this court within thirty days unredacted copies of the above memoranda and recommendations, with those parts that are redacted from the copies disclosed to the Subcommittee on Improvements in Judicial Machinery marked.

10. *See* letter, *supra* note 4 at A-16.

11. The DOJ submitted the memoranda and recommendations in question to the court with certain parts marked to indicate the Department's view of what clearly reveals what occurred before the grand jury. The court would like to provide the Department a second opportunity to review these materials in the light of the present memorandum.

Wendy VARGUS, Ind. and as Administratrix of the Estate of Jesse H. Vargus, Dec'd

v.

PITMAN MANUFACTURING COMPANY

v.

HENKELS & McCOY, INC.

Civ. A. No. 79-987.

United States District Court, E. D. Pennsylvania.

March 11, 1981.

Action was brought for the wrongful death of a crane operator, who was electrocuted when the boom of the crane he was operating came into contact with an overhead high tension line. Following a jury verdict in favor of the manufacturer of the crane, administratrix of decedent's estate moved for a new trial. The District Court, Weiner, J., held that: (1) under Pennsylvania law, assumption of risk was a defense in an action for reckless, wanton and willful misconduct; (2) the trial court did not err in instructing the jury; and (3) assumption of risk was a defense to a strict products liability claim.

Motion denied.

Subject: Review and Recommendation to Continue Investigation of Newport News Shipbuilding and Dry Dock Company

Date: 5 AUG 1982

To: Chief, Fraud Section
Criminal Division

From: Office of Economic Crime Enforcement
Criminal Division

INTRODUCTION

I have been asked to conduct a comprehensive and objective review of the criminal investigation of Newport News Shipbuilding and Dry Dock Company that was handled by the United States Attorney's Office for the Eastern District of Virginia and the Fraud Section. I was instructed to be as thorough as possible and to use my own judgment in attempting to fill any factual gaps I found. The methodology I employed and the documents and people I consulted are detailed in Appendix A to this memorandum. Two major parts of the investigation are mentioned throughout: the Richmond phase and the Alexandria phase.

The Richmond prosecution team began work in the Summer of 1978. The first Richmond Grand Jury issued subpoenas in October 1978. The Richmond prosecutors consisted of Assistant United States Attorney , Navy attorneys (Special Assistant United States Attorneys) and , and Fraud Section Attorneys and . After 18 months of investigation before two grand juries, the Richmond prosecutors recommended declination. The Alexandria prosecution team rejected that recommendation, moved the matter from Richmond to Alexandria, and decided to focus on one claim item. The Alexandria prosecutors consisted of Assistant United States Attorneys and and Appellate Section attorney . After 6 months of investigation including grand jury work, the Alexandria prosecutors recommended continued investigation and eventual indictment. I believe that continuation of the investigation is warranted at this time although problems may be encountered that might possibly militate against later indictment.

I will not duplicate to any extent here the matters discussed in the lengthy prosecution reports of the Richmond and Alexandria prosecutors. Instead (after a summary of the facts), I will focus on mostly new material setting forth evidence of an alleged conspiracy to inflate claims and discussing some relevant policy considerations.

II.

SUMMARY OF FACTS

In March 1976, Newport News Shipbuilding and Dry Dock Company (NNS) filed a revised claim (known as the "Maxi" claim) with the Navy requesting adjustments in the prices and delivery schedules of 14 ships which were either completed or under construction by NNS. The claim superceded a previous claim submitted in August 1975 (known as the "Mini" claim). The final claim covered contracts on the following ships:

- 7 submarines: L. Mendel Rivers (SSN 686), Richard B. Russell (SSN 687), Los Angeles (SSN 688), Baton Rouge (SSN 689), Memphis (SSN 691), Cincinnati (SSN 693), and Birmingham (SSN 695).

- 5 cruisers: California (DLGN 36), South Carolina (DLGN 37), Virginia (DLGN 38), Texas (DLGN 39), and Mississippi (DLGN 40).

- 2 aircraft carriers: Nimitz (CVN 68) and Dwight D. Eisenhower (CVN 69).

In February 1977, the Navy settled a claim on two of the ships and on October 5, 1978 (after review by a special Navy board) it settled with NNS on the contracts for the remaining 12 ships. The total cost overrun settlement was $208 million of the $894 million claim submitted by the company. The settlement purported to end all litigation between NNS and the government over the claims. This sum was over and above the actual progress payments made by the Navy (approximately $2.5 billion) as the ships were being constructed. The contracts between NNS and the Navy were fixed-price incentive contracts with provision for progress payments and profits but no agreed-upon price. Approximately 80% of the overruns claimed by NNS fell into the categories of "delay, disruption, and deterioration of labor." These are the so-called "soft" items. The "hardware" or "hard" items are specific components or systems in the various ships which are constructed according to drawings and specifications provided by the Navy. The special Navy board settled the claims primarily based on "litigating risk" and pointed out 47 different claim items (of approximately 300) which presented the possibility of fraud. The Richmond and Alexandria prosecutors concentrated on approximately 20 of these.

A. The Hardware Items

1. Ventilation Control Air System

The investigation regarding the Reactor Compartment Ventilation Control Air System on the Class 38, 39, and 40 cruiser was extremely comprehensive as is fully described in the Alexandria prosecution report. The allegation that NNS fraudulently submitted a claim and pegged it to an allegedly vague government guidance drawing instead of admitting that it "missed the bid" was proven to my satisfaction. However, it should be pointed out that NNS withdrew this claim item and was not compensated for it. This item establishes the methodology of the NNS claims process.

2. Bow Dome

The investigation regarding the Glass Reinforced Plastic Bow Dome on the Class 688 submarines is described in the Richmond prosecution report. The allegation that NNS falsely claimed additional costs due to a design change in the bow of the submarine (from welding to bolting) was not resolved. Reliance on the legal advice of outside counsel can be asserted as a defense. In any event, I believe that the claim item on the Bow Dome was so small ($75,000) that further investigation may not be warranted.

3. Cathodic Protection

The investigation regarding Cathodic Protection on the Class 688 submarines (the installation of zinc to ship hulls for protection against salt water) is described in the

Richmond prosecution report (separate memorandum of Navy attorney). Reliance on advice to press this claim leads me to conclude that prosecution may not be warranted. It should be noted that because the Class 688 was a new submarine, there were many change orders and much confusion during construction. Intent to defraud would be difficult to prove.

4. Copper Nickle Tubing

The investigation regarding pricing of Copper Nickle Tubing on the Class 688 submarines is described in the Richmond prosecution report. Apparently, NNS withheld the pricing information in the Mini claim but reported it accurately in the Maxi claim. Although I believe that a specific false claims count is not warranted here, the withholding of the information (to the tune of $600,000) could possibly be used as an Overt Act in a conspiracy charge.

5. Intermediate Gage Cutout Valves

The investigation regarding the added work of installing Intermediate Gage Cutout Valves on the aircraft carrier Nimitz is described in the Richmond prosecution report. eventually the claim item was withdrawn. The facts date back to 1968 and since there appear to be no intentional misstatements, I believe that prosecution is not warranted.

6. Discharge Sea Chests

Analysis regarding Discharge Sea Chests (openings in the ships' hull from which cooling water is discharged) on the Class 38, 39, and 40 cruiser is included in the Alexandria prosecution report. It is alleged by the Navy analysts that NNS sought government payment because of its own oversight of guidance drawings. Some investigation may be indicated.

7. Reactor Shielding

Analysis regarding Reactor Shielding (lead panels surrounding the nuclear reactor) on the Class 38, 39, and 40 cruiser is included in the Alexandria prosecution report. It is alleged by the Navy analysts that NNS improperly blamed the government for defective specifications when the real cause for cracks in the shielding was poor workmanship by NNS. Some investigation may be indicated.

B. Delay, Disruption, and Deterioration of Labor

1. Nimitz Delay

The investigation regarding delay in nuclear testing and delivery of the aircraft carrier Nimitz is described in the Richmond prosecution report. The test program of the nuclear reactors must be carefully performed and obviously delay will occur. The fact that NNS calculated 160 government-responsible days of delay but only claimed 123 days arguably precludes prosecution. However, I believe inquiry should be made as to how NNS calculated delay at $125,000 per day (total of $15.6 million).

2. Dwight D. Eisenhower Delay: Shipway Utilization

The investigation regarding delay in delivery of the aircraft carrier Dwight D. Eisenhower (alleged by NNS to be due to government-responsible delay on the Nimitz) is described in the Richmond prosecution report. Because of delay on the Nimitz, NNS says it moved construction of the Dwight D. Eisenhower from Shipway 11 to Shipway 9, a smaller facility, which resulted in construction delays. The Navy says that delay was due to insufficient manning by NNS not use of the smaller shipway. If (as the Richmond prosecution report states) no compensation was eventually requested by NNS, prosecution is not warranted. However, I believe that there is a $90 million claim item under this category. If so, more analysis is necessary.

3. Dwight D. Eisenhower Delay: Innerbottom Shielding

The investigation regarding delay in delivery of the aircraft carrier Dwight D. Eisenhower because of Navy change orders on the innerbottom shielding surrounding the nuclear reactors is described in the Richmond prosecution report. The report states that no compensation was requested by NNS on this item.

4. Deterioration of Labor (Parkinson's Law)

Analysis regarding the assertion of a claim for "deterioration of labor" is included in the Richmond prosecution report under the heading "Fictitious Manhours." The report states that NNS asked for $78 million in "deferred work" with respect to the five Class 688 submarines. The deterioration of labor theory of entitlement is also applied to the other ships in the claim. It amounts to approximately $100 million and is based on the unusual application of "Parkinson's Law."

In 1957, a British academician (Parkinson) postulated that in a bureaucracy there is an inexorable growth over time of the number of people hired to accomplish a given amount of work. NNS alleges that the Navy is responsible for all delays and thus with every revision in delivery schedules of the ships NNS' workers became less efficient. According to NNS, 15 minutes out of every productive labor hour spent in the month following a schedule change was wasted due to Parkinson's Law; the second month, 13 minutes an hour was wasted; the third month, 9.5 minutes, and so on until the next schedule revision. At that time, the calculation is repeated.

I believe that the bald assertion of Parkinson's Law in the context of the shipbuilding industry without the support of any empirical studies is outrageous and fraudulent.

C. Other Soft Items

1. Navy Recruiting Practices

The investigation regarding Navy recruiting practices is discussed in the Richmond prosecution report (separate memorandum of Fraud Section attorney) and analyzed in the Alexandria prosecution report. NNS alleges

that the Navy (Norfolk Naval Shipyard) recruited 720 NNS employees and that the Navy owes NNS for recruiting and training replacements (to the tune of $24 million). If NNS had spent what it claimed to train these new hires ($35,000 for each design employee, $25,000 for each production employee), the total training cost for all new hires for 1973-1974 would have been $380 million, a preposterous sum. During the relevant period, NNS also recruited Navy employees to work at NNS yet the company made no effort to offset. I believe that employees should be free to voluntarily accept new jobs anywhere (including the Norfolk Naval Shipyard). This claim item is ridiculous.

2. Added Financing Costs

Analysis regarding the assertion of a claim for added interest or financing costs because of late government progress payments is included in the Alexandria prosecution report. If the Navy was late in submitting progress payments, it violated the terms of the contract and NNS might have grounds for entitlement. But the large figure claimed (over $50 million) and the questions concerning method of calculation indicate further investigation.

3. Impact of Environmental and Safety Regulations

Analysis regarding the claim for increased costs due to environmental and safety legislation is included in the Alexandria prosecution report. The issue is whether the original contract assumed that NNS would absorb the costs of complying with the new environmental and health and safety regulations. Even if it did not, there may be no legal basis for entitlement. Further investigation is indicated.

III.

ALLEGATIONS OF A CONSPIRACY TO INFLATE CLAIMS

I believe that a sophisticated conspiracy to inflate claims regarding cost overruns was begun by NNS in the late summer of 1974 (the formation of the Contract Controls Department). The Richmond prosecution team did some work on this aspect of the case but did not make much headway. The Alexandria prosecution team analyzed the allegations. I have done a little bit of investigative work but it may be too late at this point (8 years after the fact) to prove the conspiracy beyond a reasonable doubt.

NNS was acquired by Tenneco, Inc., a Houston, Texas conglomerate, in 1968. A monument at the shipyard was removed by Tenneco management in April 1969. The monument contained the following statement by the founder of NNS: "We shall build good ships here at a profit if we can -- at a loss -- if we must but always good ships." The general belief is that attitudes and conditions changed at NNS from that time forward. A Tenneco-selected chief executive (John P. Diesel) became President of NNS in June 1972 and Chairman of the Board in September 1973. At that time the company had contracted for and was building various ships for the Navy. Most of these ships were nuclear powered and thus their design and construction were supervised by Admiral Hyman G. Rickover and his staff. Admiral Rickover alleged that the claims were ginned up and that false and fraudulent statements permeate NNS' claims.

A. The Cardwell Testimony

William C. Cardwell, a former NNS employee and member of the Contract Controls Department, testified before Senator William Proxmire's Subcommittee on Priorities and

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POLICY CONSIDERATIONS

A. Statute of Limitations Implications

The initial NNS claim was filed on August 8, 1975. It was revised and a final claim was submitted to the Navy on March 8, 1976 (beyond the normal five year statute of limitations). Thus, a false claim prosecution (18 U.S.C. Section 287) based on the March 8, 1976 submission is barred by the statute of limitations. However, I agree with the Alexandria prosecution team that the statute begins to run anew when and if the contractor files a subsequent amendment to its claim. In addition, a false claim conspiracy theory (18 U.S.C. Section 286) or a mail fraud theory (18 U.S.C. Section 1341) could extend the time period up to at least October 5, 1978 when NNS settled the claim on the 14 ships with the Navy (the statute would then run on October 5, 1983). Although I have not selected out the relevant documents, there are several letters back and forth between NNS and the Navy during 1977 and 1978 that could be utilized in mail fraud counts. For example, there is a letter dated April 20, 1978 stating that NNS' review has disclosed no major errors or inconsistencies in the Requests for Equitable Adjustments.

A more significant problem is the policy consideration of continuing an investigation that began at least four years ago

* * * * * * *

But it was not until the Spring of 1978 when any real investigative strategy was formulated. At that time Fraud Section Attorney replaced and had meetings with the FBI preliminary to a full grand jury investigation. The Richmond Grand Jury began work on the case in October 1978. I believe that the Department of Justice should have begun this investigation in earnest in the Summer of 1976

B. The Rickover Factor

Admiral Hyman G. Rickover first accused NNS of fraud in these claims shortly after they were submitted in 1976. However, there is a long and acrimonious battle between Rickover and the company which is documented in Rickover's testimony on Capitol Hill, in press accounts, and in NNS' internal memoranda. NNS lobbyist Thomas G. Corcoran was very interested in preventing Rickover's reappointment to Navy service as far back as the late 1960's. Rickover constantly feuded with NNS Chairman John P. Diesel and at various points suggested that the government buy out the shipyard and build its own ships.

NNS' criminal counsel has raised this "Rickover factor" in its confidential memorandum to the U.S. Department of Justice (pages 115-139) and no doubt would emphasize it as a defense if there were a trial. There is no doubt in my mind that a good case could be made that Admiral Rickover and his staff could be painted as viciously carrying out a vendetta against NNS and maliciously accusing the company of fraud when in fact there was none. I personally believe that Admiral Rickover and his staff were following the proper and patriotic course in working to uncover NNS' fraud. However, the Richmond Grand Jury investigation should have been (and I think it was) independent of Admiral Rickover and thus immune from any charge that Rickover orchestrated the criminal investigation. After all if Rickover's wishes had been followed, the case would have been indicted in 1978 or 1979.

My own theory of what occurred in the NNS claims process is related to the Rickover factor. I should point out that my theory has not been substantiated and probably cannot be. It goes something like this: In 1969, L.C. Ackerman became President of NNS. He immediately encountered Rickover who was very demanding. Rickover stressed the need for superior performance from NNS in building nuclear-powered ships. Ackerman felt constantly harassed by Admiral Rickover. Ackerman was basically an honest man who had to cope with pressures from Rickover as well as corporate headquarters. Ackerman capitulated to Rickover in 1971 in signing a letter concerning a contract to build submarines and in the process renouncing the advice of his own executives. Although the submarines were being built very soundly and nuclear safety was assured, the company was not showing a profit. Ackerman continued to be harassed by Rickover and wanted out. In 1972, John P. Diesel was brought in as NNS President and Ackerman was temporarily "kicked upstairs" and resigned one year later. From the start, Diesel was out to best Rickover. Diesel would not let Rickover dictate to him. He also was very concerned about profit and loss. Diesel had no experience in shipbuilding but was cracked up to be a good manager. In my opinion, Diesel was dishonest; he deliberately set up a claims process which would lead to exorbitant claims. He sized up his personnel well and was able to use F. Hunter Creech and C. Leonard Willis out front to create a massive amount of paper which the Navy might not be able to digest. Employees who had no previous experience in claims suddenly were thrust into the process and came up with unbelievable estimates for delay, disruption, and deterioration of labor. He also was able to rely on and use the experience and ability of Executive Vice President Charles E. Dart in justifying the claims. Diesel was not beyond blackmailing the Navy in threatening to stop construction of Navy ships (NNS did stop work on the Class 41 cruiser for a while). He apparently used the same "confrontation" tactics with his employees (periodic layoffs occurred) and labor unions as well as Rickover. Diesel resolved to spurn settlement until he was able to recover $200 million; his strategy was to claim four or five times that amount. The strategy worked. Diesel is now Chairman of the Board of Tenneco.

C. Civil Versus Criminal Action

I believe the question should be raised that the NNS investigation (as well as the other three criminal investigations of shipbuilders) should have been handled civilly rather than criminally.

In such a posture a civil suit under the False Claims Act (31 U.S.C. Section 231) which permits double damages would be a much better vehicle for recovery and possible deterrence of fraudulent activity. In addition, the burden of proof in a civil case is much less than that in a criminal case and thus the chance of success would be much greater.

Although it is not clear from NNS' settlement agreement with the Navy Claims Settlement Board (dated October 5, 1978), it could be argued that the settlement agreement precludes subsequent civil litigation by the government to recover allegedly false claims. NNS' criminal counsel has raised the issue that the settlement agreement is also a bar to criminal prosecution in its confidential memorandum to the U.S. Department of Justice (pages 140-143). I believe that the Navy clearly intended to preclude all civil litigation by settling the claims with the company. However, the reservation clause of the settlement agreement reserves any rights the government may have under certain criminal statutes (18 U.S.C. Sections 286, 287, and 1001) and also under 31 U.S.C. 231 (the civil False Claims Act).

Although I believe that it would be imprudent to proceed civilly against NNS, the civil alternative is a viable one and should be considered in future cases like this.

D. The Debarment/Suspension Possibility

NNS is reportedly the best of the private shipyards that build and overhaul nuclear and non-nuclear ships for the Navy. It has a long history of excellent craftsmanship and has been awarded several more contracts to build submarines, cruisers, and aircraft carriers which are now under construction. I have raised the matter of possible debarment and suspension of NNS (in the case of an indictment and conviction of the company) with the Richmond and Alexandria prosecutors. Although I don't know all the procedures involving debarment or suspension of a government contractor, I do know that the matter is solely within the purview of the appropriate agency (the Navy) rather than the Department of Justice. The consensus of the people I talked to was that there was no way NNS would be debarred or suspended by the Navy. The company's work is simply too vital to the national defense for the Navy to take any steps to halt NNS' work in building ships for the government. Apparently, debarment is not automatic with a company's criminal conviction but requires affirmative action on the part of the agency. I do not know about suspension (perhaps during the pendency of the criminal case).

A related issue is the possibility that at the time of an indictment against NNS the company might voluntarily get out of the business of building ships for the Navy. Diesel seriously considered this alternative in early 1978 at the time he ordered a work stoppage on the Class 41 cruiser (Note: a government lawsuit forced construction work to continue). Internal NNS documents disclose that NNS had enough private shipbuilding business (oil tankers) at that time to prosper. In fact construction of the North yard at NNS was to handle commercial shipbuilding activities. Admiral Rickover's suggestion that the government take over Navy shipbuilding might become a reality. My feeling is that if that were the case it would lead to massive layoffs among the 25,000 employees at NNS and at the other private shipyards.

I should point out that all of this is mere speculation on my part. I do not believe that the Department of Justice should be influenced in making a decision to prosecute or not to prosecute a case based solely on these considerations. The only relevant factor should be whether there is sufficient evidence to prove a criminal violation. However, where the evidence is borderline, policy considerations such as these may be weighed.

V.

CONCLUSION

The approach of the Richmond prosecution team (and to a lesser extent the Alexandria prosecution team) was to scrutinize specific "hardware" items in the claim. This required deep immersion in technical detail. The theory was that if the back-up documents were not totally supportive of a claim item or if a multitude of errors occurred, fraud could be proven. Although I don't believe I would have pursued that methodology in the investigation, I believe no one can be accused of "botching" it. I believe that a lot more attention should have been devoted to the initial allegation of a company-wide conspiracy to inflate claims. I have attempted to do so in Part III of this memorandum. I also believe that the "soft" items such as delay, disruption, deterioration of labor, and Navy recruiting practices should have been taken apart and shown to be outlandish. The Richmond prosecution team's conclusion that the claims writing process had integrity appears to be based only on the hardware items. I believe that the final claim narratives withstood analysis during the grand jury investigation because they had been massaged and perfected through many drafts. If prior drafts had been found for hard items, perhaps the Richmond prosecutors would not have recommended declination. In any event, the soft items constitute approximately 80% of the claim and may not be so immune from the discovery of "holes" in their entitlement theory.

My belief is that a continued investigation should focus on the NNS claims effort as a conspiracy to obstruct, impede, and delay the lawful function of government (18 U.S.C. Section 371) and the orderly claims process (18 U.S.C. Section 286).

APPENDIX A

METHODOLOGY OF REVIEW

During my tenure with the Organized Crime and Racketeering Section (1973-1980) I reviewed approximately 300 cases for prosecutive merit under the Racketeer Influenced and Corrupt Organizations (RICO) statute. This review of the investigation of Newport News Shipbuilding and Dry Dock Company was undertaken by me with the same objectivity and thoroughness I believe I brought to my previous assignments. This endeavor, however, was vastly more extensive and complicated than any other case review I had done. Because of its importance, I am setting out here the procedures I employed and the materials I examined during this review.

Memorandum

Subject	Date
Critique of the Fraud Section Memo on the Newport News Shipbuilding Investigation	May 18, 1983

To

D. Lowell Jensen
Assistant Attorney General
Criminal Division

From

Elsie L. Munsell
United States Attorney
Eastern District of Virginia

U.S. Attorney's Office

U.S. Attorney's Office

Criminal Division

I. INTRODUCTION

In January 1982, by agreement, the Alexandria prosecution team relinquished this investigation to the Fraud Section of the Criminal Division for handling. Two months prior to that, we wrote a thorough 110 page Status Report that summarized some of the more significant results of our investigation up to that point, and also analyzed a number of possible legal defenses raised by Newport News Shipbuilding (hereafter NNS). In that Status Report, we recommended that the investigation continue. We did not recommend that the company or any of its employees be indicted at that time because we felt that work remained to be done to fully develop a case. We made it clear, however, that we believed a prosecutable case could be developed if the necessary resources were made available.

The Status Report demonstrated that NNS had in fact conspired to defraud the government on a massive scale. The Status Report further concluded that there was no legal impediment to a

successful prosecution. In our view, the Status Report made a very compelling argument for continuing the investigation.

We still are convinced that there is a prosecutable case against the company and that an indictment with a reasonably good chance of success could be put together before October 5, 1983. 1/ A two count indictment charging the company with conspiracy to defraud the United States by obtaining payment on any false, fictitious or fraudulent claim, in violation of 18 U.S.C. 286 and conspiracy to defraud the United States by impeding and impairing its lawful functions under 18 U.S.C. 371 could be quickly drafted 1a/ It is not clear whether such an indictment would be multiplicitous. Assuming it was, there would still be no error in allowing both counts to go to the jury. E.g., United States v. Colson, 662 F.2d 1389, 1392 (11th Cir. 1981). We would rely upon the evidence of an overall conspiracy plus individual claim items that can be shown to be either false or based on legally outrageous theories of entitlement or both. 2/ Some of the claim items based upon outrageous theories of entitlement would have great jury appeal because the company's

1/ As our Status Report explains (pp. 105-106), there are various theories available that would allow us to argue that the conspiracy continued long after October 5, 1978, when NNS and the Navy agreed to a lump sum settlement of the company's claims. Thus, it is far from clear that the statute of limitations will run out on October 5, 1983. Nonetheless, the fact that an indictment returned after October 5, 1983 might be held to be time-barred is an argument against devoting further substantial resources to the investigation at this point.

The statute of limitations question should be examined very carefully before any decision is made to decline prosecution.

It is absolutely clear that the statute of limitations will not run on a false claims conspiracy (18 U.S.C. 286) or conspiracy to defraud the United States (18 U.S.C. 371) until at least October 5, 1978.

1a/ It is no longer advisable to bring substantive false claim counts under Section 287 because the Statute of Limitations probably ran out on such offenses on August 1, 1982. See Status

2/ We would not rely solely upon claim items based on legally outrageous theories of entitlement to compensation. Thus, there would be no need for the court to confront the interesting question of whether a conspiracy to defraud the United States could be predicated entirely upon such claims. The claim items based on outrageous theories of entitlement would be one among many facts set forth in the "methods and means" parts of both conspiracy counts.

bad faith is so readily apparent and the issues are not technical. These claim items also have the advantage of being for huge sums of money, unlike some of the hard claim items we can prove to be false. In this category we would include the following claim items: Deterioration of Labor/Parkinson's Law ($97 million); Navy Recruiting ($24 million); Added Financing Costs ($107 million); OSHA/EPA Regulations ($5.5 million); and Deferred Work ($51.5 million). 3/ We would be happy to draft such an indictment to aid you in your decision.

II. THE FRAUD SECTION MEMO IS NOT AN ADEQUATE EVALUATION OF THE STRENGTHS AND WEAKNESSES OF THE NEWPORT NEWS CASE

The Fraud Section memo marshals only the arguments -- both good and bad -- against prosecution. Some of these arguments are identical to those contained in the company's "Confidential Memorandum." The memo's characterization of the evidence and the potential legal defenses available to the company cannot withstand serious scrutiny.

It would serve no purpose here to rehash the extremely complex evidence summarized in our Status Report and in various memoranda. 4/ Nor can we respond to every point made by the Fraud Section memo in the two-week time period alloted for this critique. 5/ What we can do here is attempt to show that the major factual and legal premises of the Fraud Section memo are incorrect. We can also highlight some of the most questionable aspects of the memo.

3/ The OSHA/EPA claim item can also be shown to contain a false statement.

4/ It is important to note that , August 5, 1982 memo discussed a number of potentially prosecutable claim items that were not discussed in the Alexandria team's Status Report. memo also developed some additional evidence of an overall conspiracy to defraud that was not contained in the Status Report.

memorandum of November 17, 1982 presented additional important evidence, some of which we summarize infra.

5/ We would be happy to provide you with a follow-up memo addressing any points on which you want further analysis. It should not be assumed that we accept the correctness of any point in the Fraud Section memo simply because we do not address it here. We refer you to our lengthy Status Report for a detailed discussion of the evidence developed up to that point.

The memo's conclusions are summarized at page 2. 6/ The recommendation that the Department decline prosecution and that no further investigation be conducted is based on three conclusions, each of which is incorrect: 1) that only four of the 264 individual claim items contain false claims or false statements; 2) that there are "adequate legal defenses which will make it virtually impossible to prosecute those [four] items on a false claims or false statement theory"; and 3) that the use of an overall conspiracy to defraud theory would be "impossible under existing law and *** largely inconsistent with the evidence developed during the six years of the investigation."

Whether or not you decide to decline prosecution of this case, it is important to set the historical record straight. In view of the fact that the Department is presently in the process of evaluating its handling of the entire group of fraud cases referred to us by the Navy many years ago, and in view of the fact that more than one Senator is currently looking into this area, we believe that even if you decide to decline prosecution at this point, it would be a serious mistake to adopt memo as the Criminal Division's explanation of why prosecution was declined. 7/

III. THE EVIDENCE OF FRAUD

We assumed that the evidence set forth in our Status Report and its appendix would have convinced anyone that a massive conspiracy to defraud the government did exist at NNS, leaving aside the question whether or not it could be successfully

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6/ The memo implies that its recommendations are unanimous. But, as stated at the meeting on May 2, 1983, wrote a dissenting memo.

7/ Assuming that the Fraud Section's position is accepted by you, we would recommend that, in the future, there be better coordination between the ultimate decision makers and the line prosecutors. Had the Fraud Section's views been communicated to the prosecutors handling the investigation they could have pursued the evidence it deems essential to a successful prosecution.

prosecuted. 8/ The Fraud Section's memo gives the impression that there was probably no conspiracy and little if any actual fraud. We submit the evidence is far to the contrary. 9/ The fact is that no one outside the Navy is familiar with more than a small fraction of the 264 claim items. 10/ A substantial number of the claim items that have received even the briefest attention from Department prosecutors have been shown to be either false, apparently false, and/or based upon legally outrageous theories of entitlement. The Fraud Section's memo makes it appear that the nine claim items discussed in our Status Report were the only items we believed had prosecutive potential. However, our Status Report made it clear that was not the case. We stated (Status Report p. 4 n.5):

> The present team's investigation has thus far focused almost entirely on the DLGN 38-40 cruiser contract claims for practical reasons that have nothing to do with the relative merits of NNS's cost overrun claims on the various ship contracts. Thus, we have no reason to believe that the claims on the aircraft carriers and submarines have more integrity than the cruiser claims.

The company's 264-item claim was like a huge field of oil lying just beneath the surface of the earth. Wherever prosecutors probed, oil (evidence of fraud) bubbled to the surface. Mr. _____'s probing did not even involve a grand jury investigation

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8/ Deputy Assistant Attorney General _____ read our entire Status Report and commented that the evidence of fraud detailed therein made this case appear stronger than the Litton case, which the Department indicted many years ago, when _____ was Chief of the Fraud Section. _____ comment was made without the benefit of the additional evidence of fraud detailed in the various memoranda later written by _____. We are also familiar with the evidence of fraud in the Litton case since it was indicted in our district and _____ has been assigned to that case from the beginning. We agree with _____ evaluation of the relative strength of the two cases. The most salient difference between the two cases is that the Litton prosecution is based on a single false claim whereas in this case we have many false claim items which collectively belie any innocent explanation of the company's behavior.

9/ Indeed, the obvious fact that the company settled for $208 million on a claim of $894 million indicates that the great majority of claim items had no substance.

10/ The Navy experts have expressed the view that the vast majority of the claim items are either false or based upon frivolous theories of legal entitlement. See our Status Report at 106 n.55 ("the Navy CITARS indicate that some degree of fraud was involved in the majority of the 260-odd claim items.")

or interviewing witnesses. Merely by reading the claim items, CITARS and certain company documents already in our possession, he was able to identify several additional claim items as fraudulent. 11/

But the real evidence of the company's fraud is contained in the documents and fraud convictions have been won on the basis of documentary evidence alone, even in the face of self-serving statements by company employees. 12/ A jury could readily infer a conspiracy to defraud the government from the massive evidence of fraud contained in the claim, even without the direct evidence of a conspiracy. 13/

The Fraud Section's memo examines each item of fraud and each item of evidence in isolation. It eschews any consideration of the evidence as a whole. While this is the kind of argument the company might make to a jury at trial, it has no place here.

It is worth mentioning some of the more significant evidence developed by taking the time to read a few of the hundreds of thousands of company and Navy documents in our possession. (It should be emphasized that only a tiny fraction

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11/ _____ spent several months in the basement of the U.S. Attorney's Office in Alexandria reading documentary evidence and thoroughly acquainting himself with the facts of the case.

12/ We would rely heavily upon the Navy experts who took apart the company's claim to explain the significance of the documents to the jury.

13/ A key witness on the overall conspiracy and the company's motives is David Leighton, a brilliant engineer who was Admiral Rickover's principal aide and the architect of the contracts with Newport News. He would explain the series of poor management decisions made by NNS in the early 1970s that put the company deep in the red. He can testify that the company had a target figure of $200 million in cost adjustment claims and that the company made a deliberate decision to inflate its claims sufficiently to reach that target settlement figure.

of the documents have been read by any Department prosecutor or investigator.) 14/

had instructed to carefully examine two claim items (Discharge Sea Chests and Reactor Shielding) , was of the view that additional evidence of false statements regarding "hard" claim items was needed to make a prosecutable case -- a view we were in accord with.

The Fraud Section memo states, at p. 12, that the "principal problem" with a conspiracy to file false claims theory is that "it is not possible to prove any substantial portion of the various claims to be false." (The four claim items recognized as false add up to only $7 million or approximately 3% of the settlement total of $208 million.) In the first place, we reject the premise that only those four claim items can be shown to be false.

The Fraud Section memo argues (pp. 13, 27-29) that, even with respect to the four claim items it recognizes as false, there is no evidence of specific intent

These arguments completely misperceive the law on specific intent and the criminal liability of corporations for the acts of their employees. Moreover, the factual conclusions drawn from the evidence in this part of the memo are extremely dubious.

The leading Fourth Circuit cases on the intent element of a Section 287 offense are United States v. Maher, 582 F.2d 842 (1978), cert. denied, 439 U.S. 1115 (1979), and United States v. Blecker, 657 F.2d 629 (1981). Under established principles of

14/ The Fraud Section memo creates the impression that this case has been thoroughly investigated. That is not quite accurate. In fact, the Richmond prosecution team actively investigated the case for only about one year and its efforts were far from effective. The Alexandria prosecutors spent only three months actively investigating the case. That time was devoted largely to proving the falsity of a single hard claim item, the VCAS. details some of the mistakes and false starts that have plagued the government in his chronology of the investigation, which is being submitted separately.

conspiracy law (United States v. Feola, 420 U.S. 671 (1975)), the same intent requirement would probably be applicable to a conspiracy charge under Section 286 although Section 286 focuses upon obtaining payment for, rather than filing the false claim.

Noting that Section 287 is phrased in the disjunctive, the Fourth Circuit held in Maher and Blecker that a conviction under Section 287 may be obtained based on proof that a claim submitted to the government is either false, fictitious or fraudulent. See also United States v. Milton, 602 F.2d 231 (9th Cir. 1979). In Maher, the court held that, in each instance, the defendant must act with knowledge that the claim was false, fictitious or fraudulent and with a consciousness that he was doing something which was either "morally wrong" or which violated the law. 582 F.2d at 847. Since the knowing submission of a false, fictitious or fraudulent claim is morally wrong, it is not apparent what if anything is added by the requirement that the defendant act with a consciousness that he was doing something morally wrong. Indeed, in Blecker, the Fourth Circuit made no mention of this supposed requirement. 17/ 657 F.2d at 634. Thus, it does not appear that the intent element of the offense requires anything more than a showing of knowledge that the claim was false, fictitious or fraudulent, as stated in Blecker. In any event, the Maher requirement that the government show that the defendant acted with a consciousness that he was doing something morally wrong adds nothing material to the government's burden of proof. Thus, the Fraud Section memo's attempt to set up "specific intent" as an insuperable evidentiary barrier to prosecution is sheer nonsense. However the intent element is formulated, it is not necessary to produce a confession of company officials to

17/ Other courts of appeals have held that specific intent is not an element of a Section 287 offense (United States v. Irwin, 654 F.2d 671, 681-682 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982)), or that it is not an element where the government attempts to prove that the claim is false or fictitious as opposed to fraudulent (United States v. Milton, 602 F.2d 231 (9th Cir. 1979)).

satisfy that element. Maher itself approved an instruction that specific intent

> may be determined from all the facts and circumstances surrounding the case. And intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer the defendant's intent from the surrounding circumstances.

582 F.2d at 846. This is hornbook law. E.g., United States v. Adler, 623 F.2d 1287, 1289 (8th Cir. 1980); United States v. Rifen, 577 F.2d 1111, 1113 (8th Cir. 1978).

The Fraud Section memo (at p. 27) also cites Maher for the proposition that "proof of reckless indifference or disregard as to the truth or falsity of a statement is not enough." But Maher approved a jury instruction to precisely the opposite effect. See 582 F.2d at 846. 18/

At least one other court has also approved a recklessness instruction in a Section 287 case. United States v. Precision Medical Laboratories, Inc., 593 F.2d 434, 443-444 (2d Cir. 1978). To summarize, we have shown that all the government would need to prove in support of Section 287 counts is that Newport News employees submitted claims that were false or fraudulent, with reckless indifference as to whether they were true or false. Of course, the knowledge or recklessness element may be inferred from all of the surrounding evidence, as it almost always is.

The memo follows its discussion of specific intent with a number of factual statements and inferences from the evidence with which we disagree. We will comment on each of these statements and inferences in turn.

1. "The overall process of decentralizing the claims

18/ The jury instruction stated that the contractor had no right to make a claim for payment "for work that he knew had not been done or put on such a voucher a claim for payment with reckless indifference as to whether the work had been done or not, that is, whether the claim was true or false." Ibid. (Emphasis supplied.)

writing among 200 plus contract specialists and the reassembling of the claims suggests proper controls were present."

Our comment: Clearly, in view of the fact that the claim was extremely complex and longer than the Encyclopedia Britannica, one or two persons could not write it. Thus, the decentralization of the claims writing process was a necessity. It suggests nothing one way or the other about the integrity of the process.

2. "The review process suggests a weeding out of dubious claims. It also provides in several clear instances an advice of counsel defense. In fact, the entire process suggests on the surface that Newport News was trying to submit only valid claims."

Our comment: Internal control and review, we submit, is a neutral factor, available for use to good or evil ends.

It is also a fact that the company's soft claim items, which constitute the bulk of the $894 million claim, are largely based on outrageous theories of entitlement. [redacted] Our careful dissection [redacted] for the VCAS item revealed a sophisticated effort "to combine fabricated facts with legal theory in such a way that the end product -- the final version of the claim -- would appear to be valid on its face." Status Report at 46-47. The VCAS evidence detailed in our Status Report also clearly reveals that proper internal controls were absent from the claims process. If the review process did in fact eliminate [redacted] items, all that suggests is the sophistication of the conspiracy. [redacted]

3. "Second, the motivation to submit accurate claims is readily apparent. Newport News employees had the perception that Admiral Rickover intended to accuse Newport News of fraud."

Our comment: It is hardly determinative to speculate that this company or any of the other shipyards was deterred from submitting false claims by the fear that Admiral Rickover would accuse them of fraud. The company's motivation to submit false claims is readily apparent from analysis of its financial problems in the relevant time period.

. The evidence, tending to show good faith throughout the claims process, negates specific intent to defraud."

Our comment: This statement is unsupportable

5. "Third, in a limited prosecution of two or three claim items, the Government would be in the anomalous position of arguing that intent to defraud is present although the extent of the fraud we could establish would at most be two or three fraudulent items out of 264...."

Our comment: Although the memo states on p. 2 that four claim items "appear to contain false claims or false statements," it argues here that "the extent of the fraud we could establish would at most be two or three fraudulent items." What happened to the four false items on p. 2? Of course, we believe that we could demonstrate that many more items are false or based on legally outrageous theories of entitlement.

also finds "little evidence to support the alternative prosecution theory" that the company conspired to defraud the United States by submitting a massive number of claims it knew to be meritless in an effort to overload the Navy

claims adjustment process. 19/ In view of the large number of frivolous claims on soft items, we do not understand how Mr. can claim there is little evidence to support this conspiracy theory.

We are obviously capable of identifying a plethora of claim items as non-meritorious;

states (p. 17) that there is "no authority for predicating a conspiracy to defraud the United States by impeding and impairing its lawful functions on conduct that does not include a component of deception or trickery." Even if that were the law -- and we do not concede that it is -- it hardly would stand in the way of a successful prosecution under Section 371 in this case, where there is abundant evidence of "deceit, craft, trickery, or at least means that are dishonest." Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). 21/ The statement (p. 17) that Hammerschmidt is "the case most closely resembling this one" is simply wrong. The memo's own summary of the facts in Hammerschmidt shows that it was a prosecution against individuals who were urging non-compliance with military registration laws by circulating handbills. There was concededly nothing deceitful or dishonest about this First Amendment activity.

19/ It is perhaps more likely that the company submitted the meritless claim items in the expectation that the Navy would settle the whole claim on a percentage basis than that the company actually expected to overwhelm the Navy's claims adjustment process.

21/ The Hammerschmidt opinion adds, immediately after the words quoted by , that "[i]t is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the government intention." Ibid.; emphasis supplied.

There is nothing novel about the Section 371 count we propose. It was successfully used in the Norfolk Ship prosecution in our district in 1974.

In any event, it is doubtful that the Hammerschmidt requirement of deceit, craft, trickery or dishonesty has survived later cases. In United States v. Shoup, 608 F.2d 950, 963-964 (3d Cir. 1979), a case cited by the memo, the court of appeals stated that the Hammerschmidt language "has long ago been discarded by the courts. Section 371 now reaches 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.' Dennis v. United States, 384 U.S. 855, 861 (1966)." Thus, contrary to the memo, Shoup is not a case where the court "found a conspiracy to defraud without stating the express requirement that there be proof of trickery/deception." Rather, the Shoup decision clearly rejected the Hammerschmidt language that the memo asserts (p. 18) "presents an insurmountable *** problem." 22/

IV. POTENTIAL DEFENSES AVAILABLE TO THE COMPANY

In addition to the legal issues we have already disposed of, the memo sets up various defenses as obstacles to a successful prosecution of the company. Here, we will briefly show that none of these "defenses" poses a problem.

A. The Admiral Rickover Defense

Admiral Rickover is one of the most widely admired Americans of our time. Three former presidents from both parties attended a recent dinner in his honor. His commitment to integrity in the procurement process is widely known. We can readily argue that, in this case, he had reason to be vigilant with respect to the company's claims. A jury would love it.

22/ The Shoup decision is also significant insofar as it involved a factual situation somewhat analogous to that posited by -- the filing of a report that contains no misrepresentations or concealments but is deliberately misleading. The Third Circuit held that "[a]lthough Shoup may have submitted a technically accurate report, the jury nonetheless reasonably could have concluded that he intended to defraud the United States." 608 F.2d at 950. So too here, even if the company's claim did not contain a single falsehood or concealment, it was still designed to obtain some payment on claim items that the company knew had no legal merit. Such behavior is plainly "dishonest" even within the meaning of Hammerschmidt. See also United States v. Johnson, 337 F.2d 180, 184-185 (4th Cir. 1964).

B. Preindictment Delay

The memo suggests (pp. 29-30) that if an indictment is returned it might be dismissed by the district court on grounds of preindictment delay. 23/

there is no legal basis for a motion to dismiss based on preindictment delay. Delay attributable to lack of diligence or even negligence on the part of the government does not provide a basis for a due process/preindictment delay claim. Intentional misconduct or reckless disregard for the defendant's interests must be shown. There is no evidence that the government intentionally delayed this investigation for the purpose of prejudicing the company's rights. Moreover, there is no evidence that the company has been prejudiced by the delay. Both prejudice and intentional misconduct must be shown to support a preindictment delay claim. United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307, 324-325 (1971).

C. The Settlement Figure ($208 Million) Is Regarded By The Navy As Fair

The memo states (p. 31) that "the final sum paid as an equitable adjustment ($208 million) is regarded as fair by relevant Navy officials." We would like to know who these anonymous Navy officials are. Certainly, the Navy officials we have talked to do not regard it as fair. In any event, whether or not the $208 million settlement was fair is, of course, legally irrelevant. E.g., United States v. Pintar, 630 F.2d 1270, 1277-1278 (8th Cir. 1980); United States v. Anderson, 579 F.2d 455 (8th Cir.), cert. denied, 439 U.S. 980 (1978). This is especially true where a known consideration for settlement by the Navy was "litigative risk."

D. The Company's Criminal Liability For The Acts Of Its Employees

Throughout the memo and its appendix, it is asserted that 1) there is no link between any of the alleged high level con-

23/ We have excluded from this memo discussion of the management of this investigation. That topic is a proper subject for inquiry in an effort to learn how to better manage similar investigations in the future.

spirators and particular claim items that have been shown to be false or based upon legally outrageous theories of entitlement; and 2) the absence of such an evidentiary link is somehow fatal to this prosecution. We submit this is wrong for a number of reasons. In the first place, the claims writers were themselves conspirators. The conspiracy was not limited to [redacted] and a few high level officials of the company. Second, the higher-level officials were at least aware of the fact that the soft claim items were basedon outrageous theories of entitlement. Thus, they cannot avoid responsibility for those items. Third, the circumstantial evidence allows one to infer that at least some of the higher-ups were also aware of the falsity of many of the hard claim items and either condoned or encouraged such falsity. Fourth, and most important, the memo's apparent assumption that the company cannot be held criminally liable for the actions of the lower level claims writers unless there is evidence that higher level officials were also involved in generating false claims is simply incorrect. See, e.g., Paul F. Newton & Co. v. Texas Commerce, 630 F.2d 1111, 1121 (5th Cir. 1980); United States v. Beusch, 596 F.2d 871, 877-878 (9th Cir. 1979); Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (8th Cir. 1976); United States v. Dye Construction Co., 510 F.2d 751 (10th Cir. 1975); Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963); Continental Baking Co. v. United States, 281 F.2d 127, 149-150 (6th Cir. 1960); United States v. Milton Marks Corp., 240 F.2d 838 (3d Cir. 1957); United States v. Steiner Plastics Mfg. Co., 231 F.2d 149 (2d Cir. 1956). As already noted, a corporation may not escape criminal liability for the acts of its employees even if those acts are in contravention of repeatedly stated corporate policy.

> "The employer 'does not rid himself of [the duty to eliminate illegal practices] because the extent of his business may preclude his personal supervision, and compel reliance on subordinates. He must then stand or fall with those whom he selects to act for him. He is in the same plight, if they are delinquent, as if he had failed to abate a nuisance on his land."

Continental Baking Co. v. United States, supra, 281 F.2d at 150, quoting United States v. Armour, 168 F.2d 342, 343-344 (3d Cir. 1948) (emphasis in original). 25/

The memo asserts (p. 19) that "in the unique context of a corporation committing the offense of false statement, the Government has the obligation to prove that knowledge of the falsity was centralized in one officer or employee." It is not apparent what "centralized" means here. The memo seems to be suggesting that it must be shown that an identifiable employee had knowledge of the falsity of each claim item; in other words, it would not be enough for the government to prove that whoever wrote a particular claim item must have known it was false. Accordingly, unless the government could identify the particular individuals involved, the company would escape liability. (See memo at 23.) But we know of no case law so holding and we would be surprised if a court held that a company can defend itself by refusing to identify the individuals responsible for particular claim items. In any event, we do know who was responsible for the preparation of all the company's claims on the nuclear carriers and cruisers.

E. Materiality

One claim item that the memo concedes (p. 24) "holds some potential for being proven to be fraudulent" involves the reactor plant hot discharge sea chests on the cruisers. 26/ However, the memo states (ibid.) that, "[n]otwithstanding the apparent inaccuracy of the Discharge Sea Chest claim, there are technical problems which would preclude a prosecution predicated on this item even assuming otherwise sufficient evidence were developed in further grand jury proceedings." These "technical problems" are two in number. First, the fact that the Navy had already

25/ In the appendix to his memo, states (App. 21) that "we could not impute fraudulent intent to Newport News through an employee who was both aware of the 'vague and ambiguous' language in the [VCAS] claim and was also aware that such language was false." This makes no sense. The three cases cited for that proposition hold precisely the opposite.

26/ In our opinion, we and have already proven conclusively that this item is fraudulent.

reviewed and rejected the company's 1974 request for a contract adjustment to cover additional costs it claimed had been incurred in building the discharge sea chests "could arguably preclude that item from being 'material' to the Government in a false claim prosecution." Elsewhere (pp. 18-19), the memo also implies that this materiality requirement would somehow present a problem for us. However, it is well settled that the test for materiality is merely "whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." United States v. Snider, 502 F.2d 645, 652 (4th Cir. 1974), quoting Weinstock v. United States, 231 F.2d 699, 701-702 (D.C. Cir. 1956). The cases make it clear that a statement may be material even though the government does not actually rely on it. "It is enough that 'the potential for subversion of an agency's functioning [can] readily be inferred.'" United States v. McIntosh, 655 F.2d 80, 83 (5th Cir. 1981), quoting United States v. Beer, 518 F.2d 168, 172 (5th Cir. 1975). "A statement can be material even if it is ignored or never read by the agency receiving the misstatement [citation omitted.] 'False statements must simply have the capacity to impair or pervert the functioning of a governmental agency.'" United States v. Diaz, 690 F.2d 1352, 1358 (11th Cir. 1982), quoting United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980). See also United States v. Cowden, 677 F.2d 417, 419 (8th Cir. 1982).

In light of this case law, it is not possible to argue that the false statements contained in the Discharge Sea Chest claim item were immaterial. The false statements were clearly capable of influencing the Navy. The fact that the Navy rejected a similar claim two years earlier might have been overlooked. If NNS thought the claim item could not influence the Navy it obviously would not have submitted it.

The second "technical problem" perceives (p. 25) in the Discharge Sea Chest claim item (and also in the VCAS claim item) is that the company "could also argue with some merit that the contract specifications were ambiguous and susceptible to the interpretations embodied in its claims." This is clearly wrong. The specifications for both items were more than adequate.

V. POLICY CONSIDERATIONS

We recognize that the decision whether to proceed or to close this investigation at this time is a difficult one, on which reasonable lawyers can differ. In order to reduce the litigative risk raised by the statute of limitations question, there would have to be a substantial, full-time investment of prosecutorial resources in the face of conflicting demands for those resources. For those unfamiliar with the case materials, there would necessarily be lead - learning time involved. It is also reasonable to expect that the case brought could not be given the polish in preparation desired by dedicated prosecutors, which fact increases trial risk. On the other hand, there are significant policy considerations that urge one last try. Declination, on these facts, would tend to confirm the speculation that sophisticated conspiracies can escape criminal sanctions. This is particularly of concern, where, as here, the contractor has advanced large, frivolous claims and has sought insulation

We should also keep in mind that the damage to the United States involves not just the final payment, but the time and expense needed to evaluate and deal with frivolous claims, to the detriment of ongoing agency tasks. There is a real need to deter such conduct in the future. Notwithstanding delays and

digressions, the United States has invested much time and effort in this investigation. A further short investment, which, we believe, could reasonably be expected to result in a prosecutable case, may be warranted. Whatever the final decision, it is our hope that the legal and managerial lessons to be learned from the Department's experience of this investigation will not be lost.

Thank you for the courtesy of hearing our views on this matter.

cc: Jensen

Subject	Date
Investigation of Newport News Shipbuilding and Dry Dock Company — Work Plan for October - November 1982	September 24, 1982

To: [redacted]
Fraud Section
Criminal Division

From: [redacted]
Criminal Division

Branch Chief [redacted] notified me officially a week ago that I was being assigned to revitalize the investigation of Newport News Shipbuilding and Dry Dock Company. [redacted] asked me to prepare a short work plan which I am submitting to you. It should be noted that no other line attorneys have yet been assigned to this matter and I am therefore proceeding alone.

1. Organization of Files.

2. Theory of Case. My view is that the case will be made if the evidence on the conspiracy to inflate claims (the company-wide conspiracy allegedly begun in 1974) can be combined with the "soft" items and the one "hard" item [redacted] (Ventilation Control Air System). [redacted] believes that additional "hard" items (specifically Discharge Sea Chests and Reactor Shielding) should be examined closely to discover "false" statements. He has instructed me to do so. This will require deep immersion in technical detail starting with the Claim Item Technical Analysis Reports (CITARs) prepared by the Navy engineers.

Possible theories of the case (not mutually exclusive) include:

a. The actual falsity theory. Hours worked, material used, and thus actual costs claimed were deliberately false. This theory would focus on 18 U.S.C. Section 287 or 18 U.S.C. Section 1001 and primarily look to the "hard" items.

b. The reckless disregard theory. Claim narratives were misleading, inaccurate, and sloppy but not blatantly false. This theory would focus on 18 U.S.C. Section 286 and look to the entire claims process involving both "hard" and "soft" items.

c. The obstruction/overburden theory. The claims effort was specifically calculated to delay and impede the orderly function of Navy procurement by piling together reams and reams of somewhat factual but meaningless jibberish. This theory could utilize either 18 U.S.C. Sections 371 or 286.

d. The lulling theory. The claim narratives were put together quickly but were re-examined by the company during the period of time that the Navy Claims Settlement Board analyzed them (1976-1978). During that period, several communications were mailed to the Navy revising parts of the claim, withdrawing some claim items, and attesting to the truthfulness of the remaining claim. This theory would focus on 18 U.S.C. Section 1341.

e. The ask-for-the-moon conspiracy theory. [redacted] the company set a specific goal of $200 million in cost overruns but [redacted] ask for four or five times that ($894 million). If an insider can be "flipped," individuals as well as the company should be prosecuted under 18 U.S.C. Section 286.

3. Game Plan.

b. Read and digest the CITARs on Discharge Sea Chests and Reactor Shielding and possibly a few other new items. Determine the appropriate witnesses and documents on these new items.

c. Pursue the allegations on the conspiracy to inflate [redacted]laims:

d. Outline and organize the already-gathered evidence on Ventilation Control Air System.

f. Debrief former Navy engineer David T. Leighton specifically on the method of proving fraud in delay, disruption, and deterioration of labor claims. Determine the appropriate witnesses and documents on these items.

h. Locate any "negotiation memos" prepared by the Navy Claims Settlement Board to determine if there was or was not factual reliance by the Navy on the claim submitted by the company. Although reliance is not an element of the crime, the existence of reliance by the Navy would help this case.

i. Recommend whether the investigation should be continued for 60 more days.

cc: D. Lowell Jensen

NEWPORT NEWS SHIPBUILDING & DRYDOCK INVESTIGATION

CHRONOLOGY

(Subcommittee Note: This chronology was prepared by the Office of U.S. Attorney, Eastern District of Virginia, May 18, 1983)

There can be only one legitimate reason for declining further investigation and ultimate prosecution of the Newport News Shipbuildin (NNS) case, i.e., that, as a practical matter, a prosecution is time barred. None of the reasons for declining to investigate further, as set forth in the undated memorandum to the Honorable Lowell Jensen have factual or legal validty. 1/

Although, there are several misstatements of law and critical omissions in the memo, the most serious misimpression created is that the recommendation to close the case comes at the end of an intensive, exhaustive, and competently conducted multi-year investigative effort by the Justice Department. Nothing could be further from the truth. The Justice Department's efforts, instead, in this most important case involving perhaps the largest fraudulent assault on the Treasury in the history of the country, were

1/ Those reasons simply stated are:-

a) The case is too old;
b) Judge Merhige won't like it if we continue;
c) There is no evidence of criminal intent;
d) The Navy is to blame;
e) Newport News doesn't like Admiral Rickover and any misconduct was the Admiral's -- not the yard's;
f) The case is too complex;
g) Filing false claims is normal business condoned by everyone in the shipbuilding industry and the Navy, except Admiral Rickover -- and he is a "factor" -- whatever legal significance that term has in assessing the viability of a criminal prosecution;
h) All or some combination of the foregoing.

Counter views on the matter are fully explicated in a) our November, 1981 Status Report, b) our other papers directed in rebuttal to the memo submitted herein and c) Mr. several papers recommending prosecution.

characterized by a) the lack of accountability for management, direction and supervision of the case within the Department of

Justice, b) incompetency in the handling of the investigation's earliest stages as a result thereof, c) constant rotation and reassignment of personnel responsible for the case throughout its protracted history and d) lengthy periods during which the case languished from inattention.

At the outset of the Newport News matter, working in tandem with Messrs. _____ and _____ of the Department's Fraud Section then United States Attorney (USA) for the Eastern District of Virginia (E.D.Va.), William B. Cummings, established within his district a Fraud and Corruption Division so as to better provide a stable framework for making attorney manpower available to share in the staffing of not only the investigation of NNS, but also the Litton case (a similar matter involving another shipbuilder that had already proceeded to indictment). One problem was that the new unit's area of responsibility extended to fraud and corruption matters other than the shipyard cases involving Newport News and Litton, resulting in attorney personnel from the USA's office being too thinly spread. 2/ However, the plan was to augment the USA's staff with personnel from the Department's Fraud Section. Staffing management, and periodic review of Litton, which had been ongoing for several years prior to the inception of the need to investigate the NNS matter, had always been a joint effort of shared responsibili between the Fraud Section in Main Justice and the USA for the E.D.Va. Indeed the decision to indict Litton was made personally by former Attorney General Griffin Bell. It was understood at the outset of the NNS matter that it was to be handled in the same manner as Litton and that the creation of the special unit within the USA's office, augmented by personnel from the Fraud Section at Main Justice, would provide an improved capacity for direction, staffing, etc. than had been the case during the initial phases of the Litton investigation.

The initial staffing of the NNS matter reflected the shared responsibility concept. The two lead attorneys were

from the Department's Fraud Section, and

2/ Other significant cases referred to the United States Attorney's Office in Virginia for prosecution at the time, were the Randell - Mumford security fraud case, and the congressional bribery - tax evasion case involving Murdock Head. Both cases were assigned to the district's newly formed Fraud Section. The Randall case was jointly staffed with a senior attorney from the Department's Fraud Section; the Head case was staffed com by the United States Attorney's Office.

from the United States Attorney's Office; two Navy attorneys were made Special Assistants, and , both of whom were represented to have had considerable litigation experience before the ASBCA; ample investigative resources of the FBI and the NIS were also designated to assist.

was selected by the Fraud Section of the Criminal Division because of his considerable experience and demonstrated ability in running complex fraud grand juries. was selected by the United States Attorney's Office because of talent he had demonstrated in handling complex civil litigation. Although had no substantial experience running major criminal investigations, this deficiency in his background was thought to be offset by the extensive experience of in this area.

A grand jury was impaneled in the E.D.Va. in October, 1978, in Richmond. Taking of testimony commenced soon thereafter. Unfortunately, almost as soon as the grand jury phase of the investigation commenced, was assigned by his supervisors in Main Justice to other time consuming and significant matters. These other case assignments limited the time was able to spend on the NNS investigation. Indeed, well before the first year of the investigation ended, active involvement with the case had ceased. 3/

was replaced by another Main Justice attorney, , who was relatively new to the Fraud Section and to the field of criminal law. , like her predecessor , had other case responsibilities, which first consumed much, and then later virtually all, of her time. Accordingly, like her participation in the NNS matter ceased. Indeed, by early 1980, no Main Justice Department line attorney was in any way involved with the investigation, and there would be no line attorney assigned again until mid-1982. The investigation thus was principally conduc from late 1978 until early 1981 by Assistant United States Attorney who had no experience in complex criminal investigations.

3/ Later Mr. would self-describe his role in the case as that of a "troubleshooter". Personnel in the USA's Office, however, considered him as a lead attorney for both investigati and trial purposes.

The so-called "Richmond phase" of the grand jury investigation lasted from late 1978 through the end of 1979. At the end of 1979, the Richmond prosecution team traveled to Alexandria and presented a series of written memoranda to the USA for the E.D.Va., then Justin W. Williams, and other experienced members of his staff.

made it clear at this meeting that the Fraud Section and/or higher authority within the Department of Justice would decide the future of the case. It was clear that decision making authority according to , did not rest with the United States Attorney.

Each of the lawyers on the prosecution team, including the Navy lawyers, then discussed the status of the investigation. and AUSA generally were of the view that the investigation should be closed. The Navy attorneys avoided making recommendations deferring instead to the presumed expertise of the Justice Departmen to determine what constituted actionable criminal fraud. One of the several claims items discussed was NNS' claim for equitable adjustme on a contract for the construction of Guided Missile Cruisers. This item was the Ventilation Control Air System (VCAS) on these ships. This item is discussed at length in the 1981 Status Report. It had been assigned initially to , a Navy attorney. [redacted] the final version suggested conduct in the construction of the claim comparable to that which had caused then Attorney General Bell to authorize the indictment in the Litton Shipbuilding false claims case.

A Navy attorney assigned to the prosecution team had been principally responsible for investigating the VCAS claim item, and thus . and had only general familiarity with its evident detail. 4/ USA Williams, notwithstanding the pronouncements concerning control of the case by the Fraud Section or higher at Main Justice, directed the prosecution team to go back and concentrate intensively on this one claim item to determine whether it could stand alone as a prosecutable case or if pursuit thereof

4/ As noted in the November, 1981 Status Report, the initial investigative effort was compartmentalized. Each attorney had his own number of individual claim items to pursue and generally had little detailed knowledge of what his colleagues were doing. This manner of proceeding is not criticized. It was necessitated by the complicated and/or clever manner in which the massive claims, many dealing with sophisticated shipbuilding, engineering and accounting concepts, were submitted and documented.

would open other investigative or prosecutive possibilities.

[redacted] Presumably, [redacted] cleared this investigative plan with her superiors at the Department. No contrary instructions were received by the USA's Office from Main Justice.

In October, 1981, [redacted] forwarded to USA Williams a series of individually prepared prosecution reports. These were little more than a rehash of what had been submitted a year earlier. [redacted] also submitted an update memorandum, ostensibly summarizing all investigative efforts to that time. [redacted] again represented that the collective view of all the attorneys involved in the case was that the investigation should be shut down. As indicated in the November, 1981 Status Report, [redacted] statement was inaccurate, especially as to the views of the Navy attorneys, and could only have been accurate as to the views expressed by him and [redacted] a year earlier. [redacted] had since disappeared from the prosecution team.

Upon receipt of [redacted] series of prosecution reports and status memo, USA Williams directed the Chief of his Fraud and Corruption Unit, AUSA [redacted], to commence an in depth review and advise if he concurred in [redacted] recommendation to close the investigation. [redacted] selected AUSA [redacted], presently Criminal Chief of the USA's Office in the E.D.Va. to assist him. Upon conclusion of this effort, they determined the following:

1) Contrary to instructions, the VCAS Claim Item had not been investigated with the degree of urgency, intensity and professionalism warranted, expected and directed a year earlier.

2) Neither [redacted] nor any other Main Justice attorney participated in the effort at all -- indeed they had completely disappeared from the case.

3) The Navy attorneys had departed and gone back to their Department.

[redacted]

5) John Diesel, President of MSS had been interviewed informally, off the record, in the presence of his attorney, (Arnold Weiner,) after he had been first informed by [redacted] by letter in substantial detail of the areas of inquiry. No representatives of the government present during this session could recall when asked by AUSA [redacted] and [redacted] who said what to whom during this interview -- nor have written notes of what was said ever been found. Diesel was not the only yard employee who was interviewed in this informal manner.

6) The questions posed a year earlier remained unanswered.

It was recommended to the USA that personnel from the USA's Office undertake to do what had been previously requested of the "Richmond team", i.e., intensively and thoroughly investigate all aspects of the VCAS Item. The USA Williams, agreed [redacted]

Upon issuance of the first grand jury subpoena, NNS began a media blitz externally in the Tidewater, Virginia papers and in the Washington Post. The general thrust of the assault was to attac Admiral Rickover as the architect of the yard's present legal difficulties. The yard also wrote a letter to [redacted], then an Acting Assistant Attorney General, suggesting that USA Williams and his staff were out of control and requesting that [redacted] look into the decision of the USA to resume grand jury activity. The letter recited that AUSA [redacted] had recommended that the investigation be terminated.

At about this time, (late December, 1980 to early January, 1981) USA Williams accompanied by AUSA [redacted], met with [redacted], of the Department's Fraud Section, to advise her concernin the status of the NNS matter and to bring her up to date with regard to the investigation plan. No objections were raised by to the investigative plans of the USA. The general tenor of the meeting was that of "good luck" and thanks for keeping us in the picture. It was made clear by that she was not accepting any investigative or prosecutive responsibility with regard to the matter which had earlier been abandoned by her personnel. 5/

5/ By this time, in early 1981, Main Justice participation in the Litton prosecution case had likewise ceased. Indeed, at this juncture, attempted to avoid any active responsibility for or with it - a stance somewhat surprising to us in Alexandria given the case's national prominence and also, as noted above, the historical involvement of both offices in the case's initial staffing, supervision and management.

In addition to the assaults in the press, Mr. Hunter Creech, then General Counsel of NNS (now deceased), approached and discussed the possibility of making films to show to prospective grand jury witnesses in the NNS investigation with an agent of Murdock Head, convicted former Director of the Airlie Foundation. Head had earlier been convicted in the E.D.Va. by AUSA for a conspiracy to bribe Congressmen and evade federal taxes following a thorough grand jury investigation. Creech was apparently soliciting Airlie's filmmaking assistance and its knowledge of the prosecutive tactics of the Alexandria based prosecutors. In late March, 1981, the yard filed a motion before the district court seeking a) an order terminating the [investigation] and b) an order directing that continued enforcement of an already outstanding grand jury subpoena end. Judge Merhige denied both motions but read the riot act to the government attorneys regarding what the Court perceived as foot-dragging in the handling of the investigation. He indicated he might allow the government only a year to wrap up the matter. 6

In sum, Newport News thus ceased to view the continued investigation as pedagogical exercise which it would continue to humor with its compelled collective presence. Rather, by this time, NNS had become actively engaged in trying to shut the investigation down by, inter alia, letters to the Department, motions filed before the district court suggesting foot-dragging and bad faith by the government, press attacks, especially against Rickover, etc. and education of its people in order to limit the amount of information that might be provided to investigators

At the conclusion of the government's efforts on the VCAS Claim Item, the USA's Office believed that it had developed sufficient additional information which clearly indicated that, not only was NNS the potential target of a substantive false claims charge, but there were potential grounds for [redacted] charges against individuals. 7/

6/ In our separate memo, we have conclusively demonstrated the legal infirmity of the Court's authority to so limit a grand jury investigation.

7/ The potential for a perjury prosecution is not time barred and could be pursued.

In April, 1981, active grand jury investigation ceased. 8/

In mid summer of 1981, the new Reagan Administration's Justice Department appeared to some of us in the field to be still in the process of formulating and articulating its priorities in allocating concededly sparse prosecutional resources. Thus, before continuing to expend our own sparce prosecutorial resources in the E.D.Va., it was the considered opinion of the then USA's Office to memorialize the status of the investigation for the benefit of the Department and the new USA. The 1981 Status Report was the product of that decision. 9/

On November 1, 1981, the Status Report was finalized and dissemi to cognizant officals within the Department of Justice. No active investigation had been undertaken since earlier that March. In late, November, 1981, the new USA, Ms. Elsie Munsell, was sworn into office. By this time, complete responsibility for the staffing and prosecution of both Litton and Newport News had, by default, shifted entirely to the USA's Office in the E.D.Va. Upon assuming office, USA Munsell made structural and personnel changes within the USA's Office. The Fraud and Corruption Division was absorbed and subsumed within the Criminal Division. [redacted]. USA Munsell shortly thereafter consulted Main Justice about policy and staffing problems on both NNS and Litton.

8/ As stated, the AUSA's responsible for the early 1981 grand jury sessions were [redacted] and [redacted]. AUSA [redacted] had to cease wor on NNS in order to begin preparation for the retrial of Murdock Head in June, 1981. AUSA [redacted] used the time from April to June to review Navy CITARS and other aspects of the investigation so that, when [redacted] was free of his responsibilities in the Head case, the two could continue with the NNS grand jury effort. It was during this time period that AUSA [redacted] discovered [redacted]

b) memos authored by the Navy attorneys dissenting to [redacted] recommendations to close the investigati and c) letters to Diesel, President of NNS, and other yard employees, indicating areas of inquiry prefatory to informal interrogation, a tactic used with apparent frequency by the Richmond prosecutors, particularly with high level NNS official

9/ To somewhat over-simplify, the thrust of the Status Report was as follows: We have proven A to be false and to have been purposely constructed as such; if we should prove the same with regard to B, C, D and E, does this justify continuing the investigation with a firm view towards prosecution? At approximately the same time, the yard submitted to the Justice Department a big, blue, handsomely bound memorandum giving many reasons why it should not be indicted.

In January, 1982, representatives of the USA Office met at the Main Justice Department with Messrs. Jensen, _____ and representatives of the Department's Fraud Section. Following that meeting, AUSA _____ was instructed by USA Munsell to commence preparation of _____ He and AUSA _____ were relieved of any further responsibility for NNS. The NNS invesigation was to be undertaken completely by Main Justice.

Nothing happened for several months. Then, in late spring, Mr. _____, _____ of the Justice Department's Office of Economic Crime Enforcement, came to the USA's Office to review the status of the NNS investigation. _____ was the sole attorney sent to conduct this review. 10/

Among other things, Weiner's superiors, wanted him to evaluate the conclusions contained in the 1981 Status Report. Because preparation of the Status Report had taken three attorneys (AUSA's _____ and _____ and Special AUSA _____) several months to prepare, it was commendable that it took _____, who theretofore had been unfamiliar with the case, only four months to retrace the steps of his predecessors. On August 5, 1982, _____ issued a memo setting forth his conclusions. _____ conclusions were almost identical to those reached by the authors of the 1981 Status Report. _____ emphasized the urgency in proceeding with the case. Eight additional months had elapsed since the 1981 Statu Report and statute of limitations considerations therefore became that much more urgent. _____ himself noted this problem in his memo.

_____ views were rejected by his superiors. In a memo dated November 17, 1982, _____ vigorously dissented from the decision to close own the investigation. Four more months elapsed without progress until, apparently in March of 1983, when the Department's Fraud Section prepared written justifications for its earlier decision to close the case. Contra views were not solicited until late April. Subsequently, representatives of the USA's Office have registered vigorous dissent with the Fraud Section's factual and legal analysis under separate cover.

10/ The _____ memo now suggests that three or four full time attorneys were a minimum necessary for a successful completion of the NNS investigation. _____ neglects to explain why he sent _____ over alone.

CONCLUSION

The foregoing should put to rest any suggestion that the WNS case has been completely and competently staffed and managed over the years. Indeed, the investigation has been characterized by a series of false starts, interruptions, delays and disruptions, overlaid with a patina of institutional nonaccountability and negligence. The rationale for concluding this important investigation cannot be predicated upon:

a) the large complex nature of the items procured;

b) the Navy; or

c) upon several other reasons advanced.

Rather the blame for the case's poor handling must rest on this Department itself in failing at the inception of the investigation to fully appreciate - when clearly warned - of its complex nature, and then insuring that it would be fully and adequately manned and managed through to conclusion. To close this case out now for the reasons advocated in the memo would be quite literally to add insult to injury. Simply put, the handling of this case was hardly this Department's finest hour.

Respectfully submitted

Assistant United States Attorney

STATUS REPORT RE: INVESTIGATION OF NEWPORT NEWS SHIPBUILDING CLAIMS FOR EQUITABLE ADJUSTMENT

Eastern District of Virginia

Eastern District of Virginia

Criminal Division
Department of Justice

CAUTION: [redacted]

(Subcommittee Note: This report was prepared by the U.S. Attorney's Office, Eastern District of Virginia, November 1981)

STATUS REPORT RE: INVESTIGATION OF NEWPORT NEWS SHIPBUILDING CLAIMS FOR EQUITABLE ADJUSTMENT

I. INTRODUCTION

In January 1981, Justin W. Williams, the United States Attorney for the Eastern District of Virginia, after consultation with members of his senior staff, [redacted] of the Fraud Section, Department of Justice, and with the approval of the then Acting Assistant Attorney General, [redacted], directed that an investigation into allegations of fraud in the submission of cost overrun claims by Newport News Shipbuilding & Dry Dock Co. (hereinafter "NNS" or "the Yard") be continued. 1/ The United States Attorney's decision was made after a very detailed analysis of a preliminary prosecution report had been undertaken.

The preliminary report's conclusion that there was insufficient evidence of criminal wrongdoing by the Yard in the preparation and filing of its claims and the report's recommendation to terminate the investigation were rejected by the United States Attorney as premature, absent the kind of thorough investigation warranted by the seriousness of the Navy's allegations. The prosecution report was prepared principally by [redacted], former Assistant United States Attorney for the Eastern District of Virginia, who led the investigative team comprised, at various times, of attorneys from the Fraud Section of the Department of Justice, attorneys from the Navy assigned to the Department of Justice, and numerous FBI and NIS agents. This initial prosecution report purported to represent the collective view of all the attorneys then assigned to the investigation. 2/ In fact, it was later discovered that the Navy attorneys disagreed with Mr. [redacted] recommendation.

Of the many claims addressed in the preliminary prosecution report, we determined that NNS' claim on the Control Air System (contained in the Proposal for Equitable Adjustment on the cruiser contract) should be focused upon. It was the only claim item for which the preliminary claim drafts had not been destroyed by NNS, as part of its document destruction policy.

The preliminary drafts contradicted the facts stated in the final claim version submitted to the Navy. 3/ [redacted] Finally, this claim appeared typical of a pattern of fraud involving other claims referred to the Department of Justice, most of which had not been investigated in depth and some of which apparently had not been investigated at all. 4/ Many claim narratives omitted critical facts and/or contained false statements of material facts justifying entitlement. Other claim narratives, although not containing false facts, appeared to be predicated upon legal theories of entitlement with little or no support in the body of government contract law; while other claims contained false statements as well as spurious theories of entitlement.

Part II lays out the evidence of a massive conspiracy to inflate the value of NNS' claims against the Navy. Part III provides an introduction to the cruiser contract and the cost overrun claims process. As indicated above, Part IV focuses entirely on a single claim item within the Proposal for Equitable Adjustment on the cruiser contract -- the Ventilation Control Air System claim. Part V briefly summarizes the evidence on several other claim items -- most of which also arise out of the DLGN 38-40 cruiser contract -- [redacted] These summaries are sufficient to show that each of the claim items discussed is false. The reader who does not want to wade through our very detailed technical analysis of the Ventilation Control Air System might wish to skip Section 3 of Part IV, which analyzes the contract documents relating to that claim and demonstrates that the claim is false on that basis.

Part VI analyzes two legal questions raised by Newport News in the "Confidential Memorandum" it recently submitted to the Department of Justice. We show that the proposals for equitable adjustment submitted by NNS are "claims" within the meaning of 18 U.S.C. §287. 6/ We then show that a prosecution of NNS is not barred by the statute of limitations and that an important later part of the conspiracy relates to efforts by

NNS to pressure the Navy into agreeing to a favorable settlement of its cost overrun claims. Part VII contains our brief conclusion and recommendations.

II. EVIDENCE OF A MASSIVE CONSPIRACY TO DEFRAUD THE UNITED STATES

1. The Organization of the Yard's Claims Effort

Due to the unprecedented size of its claims effort, NNS created a special organizational component known as 'Contract Controls' to investigate, analyze, write and price out the multitude of individual claim items [redacted] Contract Controls, divided into three separate parts [redacted] One person was in charge of submarine construction and overhaul, another all surface ship construction and overhaul, and a third in charge of support, administration and clerical services [redacted] The next rung on the organizational ladder consisted of 'team leaders' -- individuals with supervisory responsibility for preparing the claims on various classes of ships. Below the 'team leaders' were 'analysts' and 'investigators.' Analysts were assigned specific claim items to research and write up. More often than not, they would be engineers, designers, production control schedulers and other technical types on loan from their respective departments to Contract Controls. They frequently had first-hand involvement in the design and/or production of the system assigned to them for claims activity [redacted]

The pricing function in claims preparation was divorced from the claims writers' area of responsibility. The suggestion made in the earlier prosecution report was that this division of labor was an index of the Yard's "institutional good faith" in its claims effort. Because there was no hard evidence of prearranged dollar target figures being imposed on the claims writers, for which they were required to create a theory of Navy liability, the Yard's integrity was presumed.

We believe this conclusion was erroneous for a number o reasons. First, the pricing of claims, like the pricing of bids on new ship construction, is an engineering specialty that most, if not all, of the claims writers were incapable of performing. Second, this division of functions enabled the senior claims writers to use their in-house cost estimators as good technical sounding boards for their claim theories, i.e., it afforded Contract Controls the benefit of obtaining 'dry runs' prior to submitting its creative endeavors to the Navy. Third, a division of labor would necessarily limit and fragment knowledge and appear to negate corporate criminal intent. Challenged claim items could more plausibly be explained as "mistakes". Thus, a sinister inference could be drawn as readily as an innocent one from the structure NNS set up for its claims effort. With the exception of a few top people, no one would be in a position to put the whole picture of the claims effort together.

III. INTRODUCTION TO THE CRUISER CONTRACT AND THE CLAIMS PROCESS

1. The Cruiser Contract

The Request for Proposal (RFP) on the 3 cruisers (DLGN 38, 39, 40) was issued to the Yard in November 1969. The RFP contained, as is customary, detailed specifications and guidance drawings so as to enable the contractor to prepare its bid. The contract for these three nuclear powered cruisers, identified by number N00024-70-0252, was definitized effective December 21, 1971 when modification P00007 was signed, establishing a delivery date, target price, target profit, incentive fee share arrangement, ceiling price and other provisions. The arrangement by which NNS was to be compensated is described in Defense Acquisition Regulation (DAR) §3-404.4 as a fixed-price incentive contract. (DAR §3-404.4 is set forth in the separate appendix to this memorandum as Exhibit #10).

Understanding this type of contract will allow the reader to appreciate precisely what NNS was seeking in its claims effort. Under a fixed-price incentive contract, the contractor

is rewarded if he performs under projected costs and is penalized if he performs over projected costs. A good discussion of the fixed-price incentive contract is contained in Department of the Army Pamphlet No. 27-153, PROCUREMENT LAW, at 5-5 (January 1956 ed.):

> (1) Fixed-price incentive contract. The fixed-price incentive contract is a fixed-price contract providing for a variable profit to the contractor. The amount of profit is determined by a formula set forth in the contract which rewards the contractor with additional profit when he operates efficiently and penalizes him by reducing his profit when he operates inefficiently. Use of this contract requires, first, that a realistic cost estimate (called the target cost) be made. To this amount a reasonable allowance for profit (called target profit) is added. A maximum amount which the final contract price cannot exceed (called ceiling price) is next determined. A final profit and adjustment formula is then established which should reflect the risks involved. After performance of the contract, the final costs are determined by negotiation between the contractor and the Government. The formula is then applied to the final costs to determine the final profit. When the actual cost of the contract equals the target cost, then the final profit equals the target profit. If the final cost of the contract is less than the estimated cost the contractor shares the cost savings by receiving a profit greater than the target profit. A final cost greater than the target cost causes the contractor to share in the cost overrun by receiving a profit less than the target profit. If the final cost equals the price ceiling, the contractor receives no profit; and when the final cost exceeds the price ceiling, the contractor must absorb the excess at his own expense. In this type of contract, the contractor is required to peform even if his costs rise considerably above the price ceiling.

The foregoing can be illustrated with the following three examples. Situation one (1) assumes an underrun of anticipated cost; situation two (2) assumes an overrun of anticipated cost; situation three (3) assumes a cost overrun beyond ceiling price. For all three examples the following figures are assumed:

Target Cost (TC)	-	$100,000
Target Fee (TF)	-	$ 10,000
Ceiling Price (CP)	-	$120,000
Share Ratio (SR)	-	60/40 *

* The government's share appears on the left side of the ratio.

Situation (1): Assume the contractor performs for $90,000; he gets $90,000, i.e., his costs, plus his fee of $10,000; in addition he will share 40% of the $10,000 cost underrun or $4,000. Thus the contractor will receive a total of $104,000. The contractor's total profit is $14,000 rather than the $10,000 he would have received had he performed at projected or target cost. In this example, the contractor has been rewarded for his efficiency in performing below target cost.

Situation (2): Assume the contractor performs for $110,000; he will receive from the government the full amount of his incurred costs of $110,000; however, he will receive a total of only $116,000. His profit is $6,000, $4,000 less than the target fee of $10,000. The math on this is as follows: $10,000 cost overrun X 40% = $4,000; $10,000 (TF) - $4,000 = $6,000 profit; $110,000 (costs) + $6,000(profit) = $116,000. Here the contractor is penalized for his inefficiency in performing over target cost.

Situation (3): Assume the contractor performs for $125,000; he will receive only $120,000 from the government. In this situation the contractor finds himself in a loss position. However, the government has no obligation beyond the ceiling price.

Another term associated with the fixed-price incentive contract is Point of Total Assumption (P.T.A.). This is reached when the cost plus computed profit reaches ceiling; thus, if cost should increase further the government will pay no more. Even when P.T.A. is reached, the contractor still makes a profit until ceiling price (CP) is reached, but the contractor will absorb 100% of all costs beyond the P.T.A. After CP is reached, the contractor is in a loss situation.

All the foregoing terms and concepts are graphically illustrated in Exhibit #12 in the appendix.

As the earlier prosecution report indicated, NNS had overrun the contract target costs by approximately $200 million. If the government was held responsible for these overrun costs, NNS would be entitled to an equitable adjustment to the

various target figures. The object of the claims effort was to push the T.C.'s and ceiling prices (and hence P.T.A. figures) as far to the right on the graph as possible. The Yard's plan was to inflate the actual amount of its cost overruns by a huge factor with the expectation of settling with the Navy at a percentage of the total amount claimed - hopefully at a figure that would put the Yard in a profit position.

The claims were so massive that they had to be disposed of outside normal Navy channels. The Navy established a special Claims Settlement Board chaired by Admiral F.F. Manganaro. It settled NNS' claims on contracts covering seven submarines, two aircraft carriers and three cruisers (DLGN 38, 39, 40) for approximately $163.7 million on October 5, 1978. Earlier, in February 1977, the Navy had settled NNS's claim on two predecessor nuclear cruisers (DLGN 36 and 37) for $44.4 million. In sum, NNS's claims effort netted approximately $208 million -- a figure placing the Yard in a profit position on its Navy contracts. Coincidentally or not, this $208 million figure represented approximately a fifth of the almost $1 billion ceiling price adjustment claimed by NNS in its several proposals for equitable adjustment.

2. The Claims Process

A. Introduction

Here, we briefly discuss the claims process to enable the reader to understand the contractual basis for entitlement to reimbursement for additional expenditures caused by the government when it modifies the basic contract by altering such things as specifications, delivery date, price and quantity. The reader should also understand the procedural route, defined by the contract and the DAR provisions, which the contractor must follow in order to obtain such additional compensation.

B. Change Orders

Pursuant to the changes clause in the cruiser contract, the Navy reserved the right to unilaterally modify its terms 9/ DAR §1-201.1 defines a change order as "a

written order signed by the contracting officer, directing the contractor to make changes which the changes clause of the contract authorizes the contracting officer to order without the consent of the contractor." According to the changes clause in the cruiser contract, this right was to be exercised by written direction from the contracting officer and was limited to "changes within the general scope of this contract." The clause allows the contracting officer to make modifications only in any one or more of the following:

(i) drawings, designs or specifications;

(ii) methods of shipment or packaging;

(iii) place of delivery.

This right of the Navy to make the changes specified in the changes clause was provided for at the time the contract was executed. Thus, neither the consent of the contractor nor new consideration is necessary in order for the change order effectively to modify the terms of the contract. The Navy's exercise of its right to issue a change order usually entitles the contractor to an equitable adjustment; however, agreement on appropriate equitable adjustment is not a condition precedent to the effectiveness of a change order. Army Pamphlet No. 27-153, PROCUREMENT LAW, at 10-4 (1976).

C. Authority to Issue Change Orders

As the changes clause indicates, it is the contracting officer, as the authorized agent of the government, who may make changes at any time within the scope authorized by the clause. DAR §1-201.3 provides that the term contracting officer "also includes the authorized representative of the contracting officer acting within the limits of his authority."

D. Written, Oral and Other Orders

Paragraph (a) of the changes clause of the cruiser contract requires that change orders be in writing. Paragraph (b) addresses communications other than formal written directives which the contractor might consider a change order. It provides, in pertinent part:

> (b) If the Contractor considers that any other written or oral communication, including any order, direction, instruction, interpretation, or determination, received from a representative of the Government, or that any other action or omission of the Government, constitutes a change order, the Contractor shall so advise the Contracting Officer in writing within ten (10) days, and shall request his written confirmation thereof.

This provision in the changes clause is a recognition of the de facto or "constructive" change order. We shall discuss the constructive change order in more detail below.

E. Scope of Change Orders

As discussed above, paragraph (a) of the changes clause limits changes to those "within the general scope of this contract." If a court or administrative review board finds that a modification is outside the general scope of the contract, then it is deemed a "cardinal" change as contrasted to a "permissible" change. If the change is not within the scope of the work contemplated by the parties, then it is one which the contractor can legally refuse to perform. Prior to the enactment of the Contract Disputes Act of 1978, 41 U.S.C. §605, a cardinal change allowed the contractor to sue for breach of contract damages in the Court of Claims and thus divested the administrative review boards of jurisdiction. Army Pamphlet No. 27-153 at 10-7. 10/

F. Notice

Paragraph (e) of the changes clause of the cruiser contract requires the contractor to submit a claim for equitable adjustment occasioned by a change order to the contracting officer within 30 days from the date of receipt by the contractor of the notification of the change.

G. Equitable Adjustment

The term "equitable adjustment" is used to describe administrative means of arriving at a price adjustment once a contract has been modified by a change order. It can result in either an increase or decrease in the price. The Court of Claims explains equitable adjustments as follows:

> equitable adjustments ... are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification, it appears patent that the measure of damages cannot be the value received by the Government, but must be more closely related and contingent upon the altered position in which the contractor finds himself by reason of the modification.11/

H. The Disputes Procedure

Effective March 1, 1979, the Contract Disputes Act of 1978 significantly altered existing disputes procedures. The new provisions apply not only to contracts awarded after the effective date but also to any claim on a contract notwithstanding the award date, if the contractor elects to proceed under the new rules.12/ Since the Yard's claims for equitable adjustment were filed prior to the effective date of the Act, and since the Yard did not elect to proceed under the Act, attention will be focused upon the former procedure.

A dispute begins when a disagreement arises between the contractor and the contracting officer. The preferred method of settling disputes is of course by agreement between the parties. Failing that, the first step in the disputes procedure prescribed by the disputes clause of the contract is for the contracting officer to decide the dispute unilaterally. See Army Pamphlet No. 27-153 at 13-3. This process is triggered when the contractor files his claim for equitable adjustment pursuant to the changes clause. Paragraph (e) of the changes clause of the cruiser contract provides, in pertinent part:

> (e) Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of a written change notice under (a) above or the furnishing of a written notice under (b) above; provided, however, that the Contracting Officer if he decides the facts justify such action, may receive and act upon any claim asserted at any time prior to final payment under this contract.

Paragraph (f) provides that "[f]ailure to agree to any adjustment shall be a dispute concerning a question of fact within [the disputes clause]." The disputes clause requires the contracting officer to reduce his decision to writing and to advise the contractor of his right to appeal his decision to the Armed Services Board of Contract Appeals (ASBCA).13/

Thus, under this system, factual disputes unable to be worked out at the contracting officer level were to be settled by the ASBCA, the duly authorized representative of the Secretary of Defense. The decision of the Board as to questions of fact was to be "final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."14/

Thus, the claims that are the subject of this investigation are those written demands for payment on cost overruns that NNS submitted to the contracting officer for his unilateral evaluation.

IV. CLAIM NO. 5.2.8 ON THE REACTOR COMPARTMENT VENTILATION CONTROL AIR SYSTEM

Introduction

NNS' Proposal for Equitable Adjustment on the cruisers was filed with the Navy on August 8, 1975. Claim Item 5.2.8 for the Ventilation Control Air System was but one of approximately 60 separately priced out claims in the Proposal for Equitable Adjustment filed on the cruisers. On August 1, 1977, NNS filed with the contracting officer a letter updating its costs on several of its proposals for equitable adjustment, including that for the cruisers. A copy of that letter is included in the appendix and identified as Exhibit #15.

In this part of our memo, we review the evidence relating to Claim Item 5.2.8 in great detail. We do this for two reasons. First, this claim is important because it alone reveals the Yard's modus operandi in preparing its fraudulent cost overrun claims. Second, this is the one claim item that

has been thoroughly investigated by the current prosecution team [redacted] We have divided this part of the memo into five sections. In Section 1, we describe the physical characteristics of the Ventilation Control Air System (VCAS). In Section 2, we describe the Yard's claim for its cost overrun on the VCAS and briefly explain why the claim is false. In Section 3, we show in more detail that Claim Item 5.2.8 is false, based on the contract documents themselves. In Section 4, we analyze the preliminary drafts of Claim Item 5.2.8 to show the fraudulent modus operandi used by NNS to develop the claim item. Finally, in Section 5, we review the highlights of the 1700 pages of grand jury testimony taken on this single claim item. The falsity of Claim Item 5.2.8 is demonstrated by the contract documents, the preliminary drafts of the claim [redacted] Together, they constitute overwhelming evidence of criminal fraud by Newport News. Moreover [redacted] we have been able to neutralize all witnesses who could possibly be put forward by the Yard in an attempt to escape conviction on this claim item.

1. A Physical Description of the Ventilation Control Air System

The Navy's Claim Item Technical Analysis Report (hereafter CITAR)15/ defines the reactor compartment Ventilation Control Air System (VCAS) as follows:

> The reactor compartment ventilation control air system is a system of pipes and valves that controls the flow of compressed air from the ship's compressed air system to the individual pneumatic operators on the large butterfly valves in the reactor compartment ventilation system.

[redacted]

The reactor compartment Ventilation Control Air System is a system separate from the reactor compartment ventilation system. The VCAS is the activator of the reactor compartment ventilation system [redacted]

NNS separately priced out and claimed overruns on both the reactor compartment Ventilation Control Air System and the

reactor compartment ventilation system (hereafter "ventilation system").

The ventilation system basically functioned to cool the nuclear reactor plant on the ship by bringing cool air from the outside in with fans, and then exhausting the heat through the stacks.

The ventilation system on the DLGN 38-40 series of cruisers was considerably bigger and more complex than its predecessor system on the immediately preceding class of cruisers, the DLGN 36-37, which NNS also built.

Some of the largest components comprising the ventilation system on both the DLGN 36 and 38 ships were valves. To simplify, there were five valves on the DLGN 36 cruisers for each reactor plant, and all of them were "diverting valves"; on the DLGN 38 cruisers there were fourteen valves for each reactor plant. Of these fourteen valves some were "diverting" only; others were "isolation" only, while the remaining valves combined both isolation and diverting functions. As we shall demonstrate in more detail below, NNS appreciated this major difference in the systems when it included the cost of the bigger, more complicated and more expensive valves in its bid on the DLGN 38.

The upgraded ventilation system on the DLGN 38 cruisers required a more extensive activating system, the VCAS, to operate the more extensive valve configuration. The VCAS on the DLGN 38 cruisers was a <u>brand new system</u> which was broken out and defined with particularity in written specifications and on a separate guidance drawing furnished to NNS with the bid package at the time the RFP was issued.

2. <u>NNS's Theory of Entitlement on the Ventilation Control Air System</u>

The Yard's factual allegations in Claim No. 5.2.8 for the Ventilation Control Air System are well summarized in the Navy CITAR:

> The Contractor represents that he was misled by the Ship's Specifications, allegedly vague contract guidance drawings, and the lack of other design data during the bid process. He states that he assumed for bid purposes that he would be building a simpler reactor compartment ventilation control air system similar to that in CGN 36 except for the high pressure portion of the system which he states he properly recognized as being more complex in CGN 38 than in CGN 36. He asserts that, subsequent to the contract definitization, continued Government actions and inactions precluded his recognition of the effort he would have to expend and added to this effort.

Ex. #14 at p. 2. This factual predicate of defective specifications and a vague guidance drawing, advanced as a basis for entitlement, is described in the lexicon of Government contract law as a "constructive change order." [redacted]

The authors of Army pamphlet 27-153 describe the constructive change order as a legal fiction and define it as:

> any conduct by a contracting officer or his authorized agent, other than a formal change order or supplemental agreement, which has the effect of prescribing new or different work than required under the contract. In effect, the Boards exercise a corrective function over contracting officers by retroactively recognizing Government caused changes to a contract, and by providing relief as prescribed in the "changes clause".

Id. at p. 10-6.

The evidence [redacted] shows that what in fact happened was that the Yard "blew the bid." The Ventilation Control Air System on the DLGN 38 series of cruisers was a brand new system designed to service the upgraded reactor plant ventilation system. Because the VCAS was so integrally related to the reactor compartment ventilation system (a major nuclear system), the Navy in its specifications (supplied to the Yard as part of the bid package with the RFP) explicitly defined the VCAS itself as a "nuclear system", and mandated that it be built according to non-deviation working drawings that would be furnished by the Navy to the Yard.

The [redacted] investigation revealed that when assignments were made to the Yard's new ship cost estimators (whose job it

was to prepare the contract bid figures) the VCAS item simply fell through the cracks. The non-nuclear section apparently thought the nuclear section had cognizance over the item and vice versa. [redacted] substantial part without charge for that specific item. The Yard will argue that the equities are therefore against an indictment based upon the VCAS claim. We strongly disagree, for a number of reasons.

In the first place, the VCAS claim is but one of many false claims knowingly submitted by NNS. It is not an isolated instance of the Yard seeking, albeit through devious means, to make itself whole for work it has performed.17/ Second, the price for the DLGN 38-40 contract was negotiated on a gross or "bottom line" basis, not item by item. It is a fact that defense contractors sometimes submit low bids with the expectation of making a killing on subsequent change orders and claims activity. Third, the Yard had an avenue of relief available to it had it simply wished to seek compensation for its error with regard to the VCAS item bid. Public Law 85-804, 50 U.S.C. (Supp.) 1431-1436 affords a contractor relief in certain situations where he suffers a loss because of unfair government action. Pursuant to DAR Section 17-204.3(ii), relief is available for "a mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer."

Rather than pursuing what would have been a colorable claim under DAR Section 17-204.3(ii), or seeking relief through a private bill in Congress (see Procurement Law at p. 13-14), the Yard chose to file a totally false claim on the Control Air item.

The seriousness with which the Congress regards the filing of false claims is underscored by the Contract Disputes Act of 1978, 41 U.S.C. §604, which provides:

> If the contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within six years of the commission of such misrepresentation of fact or fraud.

Under this provision there need be no actual damage to the government other than the costs attributable to reviewing the claim. Of course, in this case the costs of reviewing NNS's unprecedently large claims have been enormous.

3. A Detailed Analysis Of The Ventilation Control Air System Claim Based Upon The Contract Documents

The final claim narrative on the VCAS submitted by NNS is included in the appendix as Ex. #5. The heart of the narrative is set forth in the introductory paragraph:

> 5.2.8 Control Air System
>
> Section 9890-1a, PROPULSION: NUCLEAR POWER, General, of the specifications, provides that two reactor plants similar to those provided in the DLGN 36 Class will be installed in the DLGN 38 Class. As the opening statement in the specification section governing nuclear power, the Contractor had the right to assume, and did assume, that the reactor plant design for the DLGN 38 Class would be similar to that employed in the DLGN 36 Class. This same specification section, 9890, provided that reactor plant ventilation system fans, filters, valves, and instruments shall be in accordance with Government furnished Contract Guidance Plan DLGN 38800-4375731. Although this plan was available to the Contractor at the time of definitization of the contract by Contract Modification P00007, with an effective date of December 21, 1971, it could not then be recognized that it was so vague and misleading as to be deficient for either proposal or performance purposes. Specifically, with the exception of the high pressure (HP) air system, these documents did not reveal the extent of any changes in the design of the DLGN 38 reactor plant ventilation control air system; and as a result, the contract was definitized with only the changes in the high pressure air portion included in the Contractor's pricing. The balance of the control air system was considered to be similar to that incorporated into the DLGN 36 Class ships; that is, it was considered

> that the control air system would be a small non-nuclear system serving the reactor compartment ventilation valves and not an extensive and enlarged nuclear system serving the reactor compartment isolation and diverting valves.

The thrust of Claim 5.2.8 is that because of misleading language in the contract specifications, and a "vague and misleading" government furnished guidance plan, NNS was misled when it prepared its bid into thinking that the Control Air System on the DLGN 38 would be a small non-nuclear system similar to the system the Yard built on the predecessor class of cruisers (DLGN 36-37). But a careful review of all the relevant specifications and the guidance plan for the VCAS belies the Yard's allegations. The following provisions from the DLGN 38 specifications are critical to our analysis:

Section 9890-I-a provides that

> [t]wo reactor plants similar to those provided in DLGN 36 Class shall be installed in accordance with working drawings...[t]hese working drawings ... shall be used without deviation unless specifically approved by NAVSHIPS 08 or its designated representative.18/

Section 9890-1-b provides that

> [t]he Government furnished working drawings will be based on contract drawings and contract guidance drawings and will cover the following areas:
>
> 1. Reactor plant fluid systems as defined on Contract Guidance drawings DLGN 38 800-4385710 through 800-4385731.19/
>
> 2. Reactor compartment ventilation and blowoff system....

Section 9021-1-b defines contract guidance drawings as "NAVSHIPS drawings forming part of the specifications [which] serve as an illustrative guide for developing working drawings." As our Navy experts explain, contract guidance drawings are supplied to a contractor as part of the bid package so as to assist him in preparing his bid.

Section 9020-1-d of the specifications identify all the hull contract guidance drawings separately by number and description. Of particular significance is guidance drawing

#731 for the Reactor Compartment Ventilation Control Air System. Section 9020-1-d also identifies other guidance drawings that relate either directly to the VCAS itself or have significance in the analysis of the integrity of the claim narrative. They are:

Diagram #723 - Reactor Compartment Containment Pressure Control System

Diagram #732 - Reactor Compartment Ventilation and Blowoff System

Diagram #765 - Diagrammatic Arrangement of Compressed Air Systems

The lead-in sentence to the listing of the guidance drawings provides: "The following contract drawings and contract guidance drawings form part of these specifications."

The specifications dealing with the ships' high pressure air system in Section 9490-1 provide:

> Reactor Plant Air System - Supplies from the high pressure air system shall be provided to serve the reactor plant control air system and reactor plant ventilation control air system. These connections and associated reducing stations shall be in accordance with 9890-1. [Emphasis added.]

NNS relies heavily upon the word "similar" appearing in Section 9890-1-a. Needless to say, the word similar does not mean the same. As discussed above, the reactor compartment ventilation system, which the Control Air System serviced, was significantly upgraded on the DLGN 38 from its predecessor version on the DLGN 36. Contrary to the suggestion in Claim 5.2.8, NNS appreciated this fact and prepared its bid estimates for most of the upgraded features of the reactor compartment ventilation system and related systems accordingly. This is documented in their estimate sheets.

For instance, as our Navy experts explained, contract guidance plan #732 covers the entire reactor compartment ventilation system; it lists all the valves needed for the system. NNS prepared a bid on all 14 valves. As previously discussed, the number of valves on the DLGN 36 was less than half those required on the DLGN 38. In addition, the latter valves were bigger and more complicated than those on the DLGN

36. Contract guidance drawing 732 specifically mentions the Control Air System. Annotations appearing on drawing 732 direct the reader (estimator) to the specifications book, which in turn refers the reader back to guidance plan 731.

The Ventilation Control Air System on the DLGN 38, unlike that on the DLGN 36, was to be built according to non-deviation working drawings which were to be prepared and furnished the Yard by the Navy's design agent, Electric Boat, the reactor plant lead yard (RPLY) located at Quincy, Mass. Unlike the DLGN 36, a separate guidance plan for the VCAS, drawing 731, was furnished NNS by the Navy in a bid package. Section 9890-1-b specifically identifies guidance drawing 731 as "nuclear;" indeed, that Section is titled "Propulsion: Nuclear Power." The title block on drawing 731 shows it was prepared by the RPLY; the Navy approval signature on the drawing includes the words "Naval Ship Systems Command - 08" -- the designation for Admiral Rickover's command, which has responsibility for all the nuclear systems on the ships. Thus, NNS' assertion that it thought the VCAS was a small, non-nuclear system is palpably false.

The Yard admits in Claim 5.2.8 that it included the high pressure portion of the VCAS in its bid, but states that "these documents [i.e., the specifications and guidance plan 731] ... did not reveal the extent of any changes in the design of the DLGN reactor plant Ventilation Control Air System." This statement is false.

Our Navy experts explained that air from the DLGN 38's high pressure air system was needed to serve the upgraded reactor compartment Ventilation Control Air System (VCAS). This was not the case on the DLGN 36, which used low pressure air only to service its less complicated VCAS.20/

NNS must have recognized the upgraded character of the VCAS on the DLGN 38's because it included the high pressure air system component of the VCAS in its bid for the DLGN 38 ships.

Guidance plan 765 covers the compressed air system for the entire ship. Guidance plan 765, like guidance plan 732, ultimately refers the reader back to plan 731. A Yard cost estimator named [redacted] was tasked to prepare the estimate for the DLGN 38's entire compressed air system including the high pressure air component. Our Navy experts provided us with copies of [redacted] estimate sheets. These estimate sheets unequivocally demonstrate that [redacted] read and prepared a portion of his bid for the vessel's high pressure air system from guidance plan 731. [redacted] estimate does not include the bulk of the VCAS system detailed on 731 i.e., the low pressure portion of the system. As we learned through the [redacted] investigations, the remainder of the VCAS was considered to be another estimator's responsibility. In sum, NNS was aware of plan 731 and that plan was not defective because [redacted] read and studied the plan and was able to prepare an accurate cost estimate of that portion of the VCAS system assigned to him without any trouble. NNS' allegation that guidance plan 731 was "vague and misleading" and thus inadequate for bid purposes is simply without foundation.

Our Navy experts also drew to our attention a system that was subsequently deleted from the DLGN 38, the "containment pressure control air system". Its guidance plan is identified in the specifications as 723. The Navy experts advise us that guidance plan 723 is very similar to guidance plan 731 for the VCAS. [redacted] NNS cost estimator [redacted] was tasked to prepare the estimate for the system covered by drawing 723.21/ The Navy experts indicate that [redacted] estimate sheets for the system reflected on guidance drawing 723 reveal a great deal of precision. The point is that [redacted] was able to prepare a very accurate bid for a system similar in design to that of the VCAS on the basis of a guidance plan (723) very similar to plan 731 for the VCAS.

[redacted] At our request, he redid his estimate for the containment pressure control air system, using guidance plan 723. Schiller agreed that guidance drawing 723 provided him

with adequate detail to prepare his estimate for valves, fittings, piping, flanges, hangers and stores. [redacted] Although [redacted] could not comment on guidance plan 731's adequacy for bid preparation, the Navy experts assure us that it is just as adequate as 723 -- and we can easily prove that with expert testimony.

In summary then, the Yard's own engineers, present and former, put to rest Claim 5.2.8's allegations that guidance plan 731 was so "vague and misleading" as to be inadequate for bid purposes, and that this diagram, together with misleading language in the written specifications, indicated a small non-nuclear system, rather than an upgraded nuclear system.

Claim 5.2.8 alleges that the VCAS was an "evolving" system and that the first "meaningful indication" of the size of the system (compared to that on the DLGN 36) did not become apparent until July 1973, when the Yard received Rev. B, a working drawing. The claim narrative indicates that NNS recognized material changes on this working drawing, notified the Navy and ultimately negotiated a supplemental agreement with the Navy for certain of the changes. Claim 5.2.8 states that when the Yard was preparing its estimate for the "out of scope" work detected on Rev. B, it was unable to fully claim for all the added costs to the VCAS because the Navy furnished design data was "so incomplete and ambiguous as to preclude meaningful analysis," and because the working drawings failed to indicate piping lengths required in the VCAS. These allegations are also false.

The Navy engineers who prepared the CITAR on Claim 5.2.8 have carefully retraced the chronology of events, including all communications between the Navy and the Yard, and have destroyed NNS' allegations of "system evolution." [redacted]

The Navy CITAR shows that on May 30, 1972, the Yard notified the Navy that the working drawing for the VCAS was overdue and urgently needed. The Navy responded on June 5, 1972, by furnishing a working drawing with a level of detail much greater than on the guidance plan. In June 1973, the

Navy issued another working drawing, Rev. B.23/ Rev. B added high pressure air reducing stations to the VCAS that were not found on guidance plan 731. On August 30, 1973, the Yard sent TWX 107 to the Navy advising that it considered the additional material (i.e., added reducing stations) beyond the scope of the contract. The important thing to note here is that TWX 107 listed only the added reducing stations as a constructive change entitling it to added compensation. TWX 107 explicitly states that the Yard carefully compared Rev. B. with guidance plan 731 in arriving at its conclusion:

> 1. Newport News review of (EB Dwg. 38643-01X01) reveals materials specified which are not on contract guidance drawing 800-4385731.
>
> 2. Newport News considers the additional material on (EB Dwg. 38643-01X01) will involve work beyond the scope of contract N00024-70-C-0252.
>
> 3. Newport News is preparing an order-of-magnitude estimate of the additional cost and will inform NAVSHIPS by separate communication.

As a result, on September 26, 1974, the Navy authorized the contracting officer to negotiate a contract modification to include the air reducing stations not shown on guidance plan 731.24/ On November 14, 1974, the Navy and Yard executed MOD A00468, a bilateral supplemental agreement incorporating the changes authorized by HMR-145.

On October 1, 1974, and November 21, 1974, the Navy issued NNS detailed installation working drawings for the Ventilation Control Air System. These drawings detailed the exact routing of piping, piping dimensions, and exact installation locations for mounting VCAS components. As the CITAR, Ex. #14 underscores at p. 25:

> These detailed drawings could not have been developed until information on the shipbuilder's components and structure had been received from the shipbuilder to enable the RPLY to work out a satisfactory design in conjunction with the shipbuilder. It is noted that these drawings were to be provided "as they become available" in accordance with the terms of the contract. The drawings were provided as early as receipt of satisfactory shipbuilder information reasonably allowed.

Claim 5.2.8 seeks compensation for installing components listed both on the original guidance plan and the two subsequent detailed working drawings. But if the Yard actually considered any of these components -- other than the added reducing stations -- to be new or otherwise outside the scope of the contract, it clearly would have promptly notified the Navy of that fact, as required by the changes clause of the contract. The fact that the Yard failed to make any other claim contemporaneous with its claim for the added reducing stations is persuasive evidence that it did not consider the working drawings to have added anything to the original guidance plan for which the Navy was required to pay additional compensation.25/

In sum, Claim 5.2.8's theory of an "evolving design" in the VCAS is without foundation [redacted] The claim narrative indicates that NNS cost estimators actually read and relied upon the Navy's guidance plan and specifications in helping to prepare NNS' contract bid, and that NNS' bid did not take account of the true cost of the VCAS because of deficiencies in the documents supplied by the Navy. However, in reality, the Yard, through mismanagement, simply overlooked the bulk of the VCAS system in preparing its bid. Thus, whether or not the documents supplied by the Navy were vague or misleading is actually beside the point because NNS employees, with the exception of [redacted] never even looked at them. In any event, as we have shown, the documents supplied by the Navy were perfectly adequate to enable the Yard to prepare an accurate bid, had it taken the trouble to read them.

V. OTHER FALSE CLAIM ITEMS UNDER INVESTIGATION

1. OSHA and EPA Claims

NNS alleges in Claim item 5.9.2 on the DLGN 38-40 cruiser contract that it incurred increased costs due to government actions, specifically, the passage of environmental legislation

including the Clean Air Act of December 1970 and the Water Pollution Control Act Amendments of October 1972. Claim item 5.9.3 on the cruiser contract alleges that Newport News incurred additional costs due to the government's passage of the Occupational Safety and Health Act of 1970.

NNS alleges that since the contract negotiations were based upon its September 15, 1970 bid proposal, no consideration was given to the impact of the subsequent Clean Air Act or Water Pollution Control Act Amendments. NNS also alleges that since OSHA was not established until April 1971, no consideration was given to the impact of OSHA on the proposed contract.

Claim item 5.9.2 (Added Environmental Control Requirements) states, in pertinent part:

> In December of 1970, the Environmental Protection Agency was established and under the authority of the amendments, the emission standards were subsequently promulgated. The federal water pollution control act amendment was enacted during 1972 (October). During this same period, actions were under way which would lead to definitization of the contract. Since the negotiation in progress was of the 1970 proposal, no consideration was given by either contracting party to the impact of the Clean Air or Water Pollution Control Act Amendments upon the proposed contract.

Claim item 5.9.3 (Occupational, Safety and Health Act of 1970) states, in pertinent part:

> During the same period [December 1969 - December 1971], the Government enacted the Occupational Safety and Health Act (OSHA) in April of 1971. Since the negotiation in process was of the contractor's 1970 proposal, no consideration was given by either contracting party to the impact of OSHA upon the proposed contract. In this section of the proposal, the contractor will show that OSHA did have an effect upon the performance of this contract, what that effect was, and that the Government, in the contract, had agreed in such cases to an equitable adjustment.

The claims then set out NNS' argument as to why these added costs should be passed on to the government, including the steps the Yard took in order to comply with the new legislation.

The original bid proposal was submitted by NNS in response to the RFP and guidance plans which were sent to NNS in

November 1969. The original NNS bid proposal was submitted on September 15, 1970. However, on July 23, 1971, a supplemental proposal was submitted by the Yard. In its July 1971 bid proposal, the Yard attributed a direct cost of $3,700,608 plus 2.4 percent of overhead (amounting to $2,556,000) for compliance with OSHA and EPA requirements.41/ Schedule E, attached to the July 1971 bid proposal, reads as follows:

> The proposed target costs for these ships includes $1,870,591 for the DLGN 38, $987,675 for DLGN 39, and $932,338 for the DLGN 40 to cover the estimated impact of current laws such as the Occupational Safety and Health Act of 1970 and Environmental Control legislation on direct costs and associated overhead. Estimated costs were derived by applying a 2 percent factor to all productive (including supervision) hours plus associated overhead to reflect the loss of efficiency, expected due to the necessity of operating under the adverse constraints. Also included for each ship is an estimated $50,000 for miscellaneous consumable materials.
>
> The proposed overhead rate includes 2.4 percent to cover additional and direct costs estimated to be incurred as a result of the legislation. The additional overhead was derived by evaluation of the capital expenditures required, cost of indirect labor, lost direct labor hours for various medical examinations, record keeping and other miscellaneous costs.42/

Thus, it is crystal clear that, contrary to the representations made in claim items 5.9.2 and 5.9.3, consideration was given to possible increased costs due to EPA and OSHA requirements.

It is important to note that even if the Yard's OSHA and EPA claims were factually correct, they would still lack any legal foundation since it is firmly established that the United States as a contractor cannot be held liable directly or indirectly for public acts of the United States as a sovereign.43/ Horowitz v. United States, 267 U.S. 458 (1925); Sun Oil Co. v. United States, 572 F.2d 786, 817 (Ct. Cl. 1978); Tony Downs Foods Co. v. United States, 530 F.2d 367, 370-371 (Ct. Cl. 1976); Glasgow Associates v. United States, 495 F.2d 765, 770 (Ct. Cl. 1974); Reynolds Metal Company v. United States, 438 F.2d 983, 987 (Ct. Cl. 1971); J.A. Jones

Construction Co. v. United States, 390 F.2d 886, 887 n.3 (Ct. Cl. 1968); Wunderlick Contracting Co. v. United States, 351 F.2d 956, 967 (Ct. Cl. 1965). The fact that the OSHA and EPA claims lacked even a colorable legal basis is another indicium of NNS' lack of good faith.

2. Navy Recruiting Claims

NNS alleges that it encountered unanticipated costs of $23,723,192.00 in the performance of its contracts on the 14 vessels as the result of Navy recruiting practices. This figure was divided equally amongst the 14 ships in the amount of approximately $1.7 million each.

The claim alleges that "the contractor incurred added costs for recruiting, hiring and training of new and replacement employees as well as added costs to adjust workloads as a result of the unanticipated departure of employees who were recruited by the federal government." It further alleges that the government's promotional advertising had a direct effect upon the loss of employees to the government, specifically the Norfolk Naval Shipyard. The loss of employees was primarily due to the Navy's intensive recruiting campaign during May and June 1974.

In order to fulfill its contractual obligations during the period January 1, 1973, through October 31, 1974, NNS had to maintain a level of employees sufficient to perform the contracts on the 14 ships. Therefore, it claims it mounted an extensive recruitment effort.44/ In approximately 10 pages of claims narrative NNS sets out its recruiting efforts to attract hourly employees, and design and salaried employees. The narrative is written in such a way as to lay blame on the Navy for NNS' difficultly in obtaining the results it desired from its recruiting efforts. Although NNS asserts that 10,493 employees voluntarily resigned from January 1, 1973, through October 31, 1974, it was only able to determine that 342 of those employees were taking jobs with the Navy. There were, however, no specific reasons given why those employees left

Newport News, or why they joined the Navy. The figure of 342 represented those employees who indicated that they were leaving for the Navy out of the 4,722 who had agreed to give exit interviews. NNS calculated that 720 employees left the Yard to join the Navy, based on an extrapolation from the 342 employees known to have joined the Navy.

The thrust of the claim is that as a result of Navy recruiting efforts a number of employees left NNS to take positions with the Navy. Consequently, in order to maintain its workforce, NNS had to recruit new employees. In order to maintain the level of proficiency of its employees, training and recruiting costs were incurred. NNS based its calculations on a figure of $25,000 training costs for a skilled union employee and $35,000 for a salaried or design employee. These calculations were premised upon the recruitment of employees with a zero skill level, and a five-year training period. Furthermore, the figure included salary costs while the new employee was doing productive work.

This claim seems ripe for further investigation because the legal theory of entitlement is completely spurious for the same reason that the OSHA and EPA claims are -- it ignores the sovereign act doctrine; and the training and recruiting costs are calculated in a fashion that shows a conscious disregard for the truth.

1. Many vacancies were created by voluntary terminations of employees with little experience. Consequently, a new employee could be trained to that relatively low level of proficiency at minimal cost. The number of terminations claimed during the period included terminations of all employees, skilled and unskilled summer help, janitors and secretaries.

2. Many of the vacancies were filled by rehires who needed minimal training. For example, in 1973, NNS filled 38.6 percent of its vacancies with rehires and in 1974, 45.7 percent.

3. Newport News failed to mention that the Navy also loses skilled employees to Newport News, thus reducing NNS' training costs.

4. Newport News states in its claims narrative that costs due to Navy recruiting were unanticipated. However, it is clear that the Yard has historically lost employees to the Navy.

5. NNS did not compare the size of its claim with its actual recruiting and training costs to verify the accuracy of the estimate.

6. No base period of comparison was established to show whether there was an increase in terminations during the claim period due to intensified Navy recruiting activity.

7. A Yard employee who worked on the training costs came up with a figure of $24,000 per union skilled employee and $31,000 per design and salaried employee while in its claim NNS used a higher figure resulting in an overall increase of $1.7 million.

That NNS' claims in this area are grossly exaggerated is shown by the fact that were NNS to calculate its retraining costs for all job vacancies at the same rate it calculated its retraining costs allegedly attributable to Navy recruiting, the amount would be more than $333 million, a sum equal to 55.6 percent of NNS' total direct and indirect labor costs for its work force of 24,000 plus employees.

3. Claim Item VII.B.8 (Bow Dome) and Claim Item VII.B.9 (Cathodic Protection) in NNS' Proposal for Equitable Adjustment on the 688 Class Submarines

The prosecution report prepared by the initial investigative team addressed these two claim items at some length. The Yard's claims on these two items are devoid of merit -- a conclusion concurred in by the initial investigative team.

It will be recalled from the initial pros report that the sequence in the initial preparation, filing, rewriting and refiling of these two claims was virtually identical.45/ The claim narratives for both items, as initially written and

filed with the Navy, were based upon an erroneous premise -- that the Yard prepared its bid on the two items after the new ship estimators reviewed Navy-furnished specifications and mistakenly concluded therefrom that a particular method (welding) was required for installation of both items. The Yard later learned, after receiving Navy-furnished working drawings, that a more expensive installation method (bolting) would be required. According to the initial claim narratives, these "changes" resulted in government-responsible cost overruns on both items. As with the VCAS claim on the DLGN 38-40 cruisers, the Yard's theory of entitlement for these two claims was predicated upon the "constructive change order" doctrine.

[redacted] The rewritten claims contain material omissions of fact and state a spurious theory of entitlement bearing no relationship to the historical events leading to the Yard's cost overrun on these two items.

The reviewers in the Department have the initial prosecution memorandum with attachments for these two claims, as well as the spade memos for these claims prepared by Assistants in the United States Attorney's Office in the Eastern District of Virginia.

4. Discharge Sea Chests Claim

NNS claims that it encountered three areas of added work and increased costs in connection with the reactor plant hot discharge sea chests on the DLGN 38-40, the cruiser contract, which were not contemplated by the parties. This added cost allegedly resulted from deficient specifications and/or deficient Navy data.

Discharge sea chests are openings in the ship's hull from which cooling water or other fluids used internally in the ship are discharged. The sea chests discussed in the claim are only in the reactor plant systems. Because discharges via the sea chests are of high velocity, and elevated temperatures, they may cause accelerated corrosion.

The claim concerns three specific areas involving the discharge sea chests. First, the sea chest material was

changed from steel to monel; second, thermal sleeves were and, third, welding instructions on the working drawings were allegedly vague, unclear or incomplete, causing rework of previously welded components.

Because of the corrosion problems, the design of the sea chests was changed on the CVN 65 (U.S.S. ENTERPRISE). The Navy, in March 1969, had its design agent, NNS, redesign the sea chests in order to minimize the effects of the discharge. NNS recommended and the Navy concurred in the installation of monel sea chests with thermal sleeves for the carrier in 1969, and NNS assisted in the installation of eight monel sea chests with thermal sleeves in the U.S.S. ENTERPRISE during October 1969.

As part of the DLGN 38 bid package, NNS had the specifications and contract guidance drawings in November 1969. The contract guidance drawings, 722, 729 and 730, showed that monel sea chests with thermal sleeves would be required. The three drawings indicated by a detailed enlargement or legend note, or both, that the coolant discharge sea chests, steam generator release valve discharge sea chests, and the steam generator blow down sea chests, "shall contain 'thermal sleeves', shall be monel, and shall be welded integral with the hull." On two of the guidance drawings, an arrow points to the sea chests, and the words "THERMAL SLEEVES" appear, together with a drawing of the sleeves. On another, 722, alongside the symbol for the sea chests, are the words "See note 31." Note 31 states that "in lieu of flanged sea valve a flange spool piece shall be located downstream of sea valve to allow removal of sea chest thermal sleeve." The three drawings on the DLGN 38 also indicate, by detailed enlargment, a thermal sleeve extending beyond the exterior of the ship's hull. A comparison between the DLGN 36 and DLGN 38 contract guidance drawings shows that the DLGN 36 drawings bear the notation "waster piece" where the DLGN 38 drawings note "thermal sleeve". The diagram on the DLGN 36 drawings indicates a waster piece that does not project beyond the exterior of the ship's hull.

Furthermore, on September 7, 1971, the reactor plant lead year (RPLY) issued the working drawings for monel sea chests and thermal sleeves for the DGN 38. They were entitled, "Discharge Sea Chests . . . Nuclear." It is clear from the Yard's acknowledgement of receipt of those drawings that they were in the Yard's possession on September 10, 1971, prior to bid and contract definitization. The drawings set out the type of sea chests that the DLGN 38 class ships were required to have. However, with regard to the steam generator bottom blow sea chests (2 of 8), the design was indicated to be monel with thermal sleeves but the drawing was "reserved."

A review of paragraph 9480-0-A of the cruiser specifications indicates that Section 9480 -- which specifies that the hull be made of steel, a less expensive metal than monel -- is not applicable to reactor plant sea chests unless noted elsewhere. Thus, contrary to NNS's position, there is no conflict between the working drawings and Section 9480. Furthermore, a comparison of the specifications for the DLGN 36, 38 and CVN 68 indicates that the words of Section 9480 are similar in all three. Significantly, the CVN 68 was built having monel sea chests with thermal sleeves similar to the DLGN 38. Thus, in building the CVN 68, NNS did not interpret Section 9480 in the same manner as it allegedly did in bidding on the DLGN 38 cruisers.

After receipt by Newport News of the advance copies of the working drawings on September 10, 1971, they were apparently reviewed and material procurement initiated, since on October 1, 1971, LAR 98-9453 (Liaison Action Request) was issued requesting a change in the drawings to facilitate welding. It is clear that the LAR could have been prepared only after a detailed review of the design for the discharge sea chests. On November 3, 1971, also before contract definitization, NNS issued a supplement to the LAR which noted a structural interference between the sea chest flange and a gusset. The supplement stated (after receiving Electric Boat's reply to LAR 98-9453, which permitted the use of a weld neck flange in lieu of a

flat plate flange), that NNS had investigated the installation requirements. Thus, it is apparent from NNS' request for a change in the non-deviation drawings that it had reviewed them in detail.

On November 24, 1971, the reactor plant lead yard, Electric Boat, sent NNS the working drawings. They were unchanged from the advance working drawings except for the change asked for by NNS. On December 21, 1971, the contract was definitized.

On April 12, 1974, the RPLY issued revision B to the sea chest drawing for the steam generator blow down sea chests, which earlier had been "reserved". On May 16, 1974, NNS issued a teletype communication (TWX) stating that it considered the cruiser sea chest work to be beyond the scope of the contract because the sea chest designs for all reactor plant sea chests were "significantly more complex" than on the DLGN 36 ships and because NNS had overlooked the fact that they were to be made of monel. NNS stated that it "overlooked" the monel shown in the DLGN 38 guidance drawings when it submitted its bid and only became aware of the complexity of the sea chest design on April 12, 1974, when Rev. B of the sea chest drawing was received. On October 16, 1974, the government responded by setting out the above mentioned chronology of events, which clearly indicated that NNS knew or should have known of the DLGN 38 design for the discharge sea chests and rejected its contention that it was beyond the scope of the contract. It is clear that NNS was seeking government payment for its own oversight both in its TWX and in the claim. After the government's response to the TWX, nothing further was heard from NNS on the matter until the claim was filed in August of 1975.

The thrust of the portion of the claim concerning weld joint numbers is that the RPLY failed to include such numbers in the drawings it supplied to NNS. However, weld joint numbers are simply not required, although they are often included to draw attention to particularly important welds. NNS was required to make welds that would meet standard inspection

requirements regardless of whether weld joint numbers were included.

In sum, there can be no dispute that, prior to contract definitization, NNS had specifications and contract guidance drawings that clearly indicated that the discharge sea chests were to be constructed of monel with thermal sleeves. NNS' recognition of this requirement is shown by its issuance of LAR 98-9453 and the supplement thereto, which requested a change in the advance copy of the sea chest working drawings that had been received by NNS on September 10, 1971. If NNS missed the bid on the discharge sea chests, it was clearly the result of its oversight, as NNS conceded in its TWX issued on May 16, 1974. NNS' claim that its cost overrun was due to deficient government supplied guidance drawings and specifications is knowingly false.

5. Added Interest or Financing Costs

In all of its proposals, NNS claims equitable adjustment for interest or financing costs. NNS asserts that the Navy failed to make progress payments in sufficient amounts for change work caused by the Navy, thus requiring it to provide financing for such additional work. The financing claims totalled $50,473,275 excluding the DLGN 36, 37, 41 and 42.

A common thread runs throughout each of the narratives.46/ The claim on the DLGN 38, 39 and 40 states in pertinent part:

> Had the billing base been adjusted to cover the changes, and had progress payments been forthcoming as contemplated by the contract, the contractor would either have reduced his short term bank borrowing or increased his investments.

The amount of each claim was calculated similarly. On a monthly basis, NNS took the cumulative cost of building the ship as of the end of that month and added five percent.47/ NNS then subtracted all Navy payments to date, which resulted in a figure, "loss of revenue", to which was added the cumulative prior months' interest. This figure was then multiplied by 115%. (This percentage was used because NNS claimed that a compensating balance of 15% had to be maintained on deposit at

a bank in order to qualify for loans at the prime rate.) This figure was then compared to NNS' actual average monthly borrowing for the entire Yard. Interest was then calculated on the of the two figures. But if the average NNS wide borrowings were less than the loss of revenue, the difference was used to calculate the interest on investments that could have been made if the Navy was paid for the change work on time.

Additionally, on the submarines SSN 686 and 687 claim narrative, NNS stated that it claimed adjustment for additional financing costs incurred as a result of changes in FICA.

While NNS' theory of entitlement may be correct here, the methodology used in calculating the interest or added financing costs again indicates a total disregard for the truth. First, NNS simply assumed that all cost overruns were the result of Navy actions. It made no attempt to distinguish between cost overruns that might be attributable to the Navy and those that were so clearly not the Navy's responsibility that it never even sought compensation for them. Second, NNS calculated its borrowings based upon the prime interest rate when in fact it borrowed substantial sums from its parent company, Tenneco, at less than the prime interest rate. Because no compensating balance was required by Tenneco, the 115% multiplier should not have been used on monies borrowed from Tenneco. Apparently, NNS' calculations also improperly excluded escalation payments on the DLGN 36 contract. Excluding these escalation payments increased the difference between payments made by the Navy and NNS' monthly cost overruns. Finally, NNS is claiming interest on its administrative time lag in requesting progress payments. Elimination of the time lag element, i.e., the time used to prepare and present a claim to the Navy for progress payment after the work was performed on the DLGN 38-40 contract, results in a decrease of $1,442,589.00 in the claim amount.

6. Reactor Shielding Claim

NNS claims that it encountered unanticipated problems in building the reactor shielding on the DLGN 38-40 series of cruisers due to alleged deficiencies in the government-furnished

design. According to the claim, the design did not allow for adequate dissipation of the heat generated during installation of lead shielding. Moreover, the design required NNS to fabricate certain lead panels in a more complex manner than necessary and the Government did not approve NNS' recommended simplification until too late. Consequently, NNS was entitled to costs arising from its investigation of the problems, including engineering efforts to recommend design changes, a mock-up fabrication, and additional production efforts to implement the recommended design changes that corrected the alleged deficiencies. The claim also seeks equitable adjustment for disruption and delay caused by the deficient Government supplied drawings and plans.

The shielding discussed in the claim consists of a primary and a secondary shield. The primary shield surrounds the entire reactor vessel while the secondary shield surrounds the reactor compartment. The shields consist of a cylindrical inner steel wall or bulkhead with a series of vertical and horizontal structural steel stiffener plates (divider plates forming a honeycomb-like array of cells called "bays" on the outside of the cylinder). Lead slabs are installed in each bay and each lead slab is bonded around the perimeter to the steel wall and the divider plates by lead. The melted lead must bond to the steel and fuse to the lead slab. Polyethylene plastic shielding material or a more temperature resistant material known as PPC were required to be installed over the top of the lead sheets. The shield bay is required to be sealed with a steel cover plate that is welded to the divider plates and seals the plastic shielding material within the shield bays.

A. The primary shield may be fabricated essentially as a complete cylindrical assembly in the Yard shop. The secondary shield, which is a larger, heavier structure, cannot be handled in the same manner. Consequently, NNS built the secondary shield in segments and installed the plastic shielding material

(polyethylene) in many bays of the secondary shield in the Yard shop before welding the segments together on the ship. Assembly of the segments required that lead and plastic not be installed in the shield bays that contained "erection butts." Erection butts are the welded structural joints which join individual segments of the shielded bulkhead to the ship and to each other. Once these erection butt welds are made, lead and plastic shielding must be installed over them to complete the shield installation.

During construction in late 1972, NNS recognized "a potential problem" with the secondary shield. A mock-up was constructed and a LAR (Liaison Action Request) dated February 8, 1973, was initiated. The problem was that the heat required to join the lead panels in bays containing erection butts was great enough to melt shop-installed polyethylene in the shield bays. A similar problem was recognized by Newport News in the primary shield around the temporary access openings. The mock-up confirmed NNS' concerns and it proposed five ways in which to remedy the problem: (1) install the polyethylene in the bays on board the ship after the erection butts in adjoining bays were connected; (2) use a high temperature polyethylene (PPC); (3) use caulking instead of lead to connect panels adjacent to erection butts; (4) use asbestos sheet insulation to protect the polyethylene; and (5) accept the melting. The RPLY in a series of Plan Revision Notes (PRNs) approved the use of a more expensive heat resistant polyethylene (PPC) at NNS's option.

B. In mid 1973, cracks were discovered in the primary shield while it was being fabricated in the shop. An investigation by NNS revealed that the cracks were due to poor workmanship. NNS assured the Navy that steps would be taken to prevent a possible recurrance.

However, in October 1973, a new problem arose when lead cracks and unbonding were discovered again in the primary shield and also in the secondary shield. NNS first investigated its personnel but "determined" that procedures were in accord

with military welding standards and the "contractor's personnel possessed adequate skill and exerted reasonable care." NNS notified the Navy of these problems in December 1973 and January 1974. The Navy suggested by letter that a similar problem had occurred at other shipyards which "showed the need for including temperature control requirements in the procedures for lead bonding to minimize the costly rework and repair for bond defects." On the same date, NNS recommended either the use of the caulk method (packing of lead between joints) or the installation of doubler plates to provide additional heat sink and heat diffusion. For the first time, in March 1974, in a LAR, the Yard considered the problems to be traceable to "defective specifications" and not poor workmanship.

C. In another part of the claim, NNS asserted that a non-deviation drawing, 842, required lead of varying thicknesses be installed around the periphery of the primary shield tank. In order to accomplish this, NNS had to cast lead slabs in the required thicknesses and join them by bonding. NNS alleged that past experience had shown this to be complicated and expensive. NNS proposed that a standard sized parent slab be installed with a "piggyback" slab welded on to fill in the shield tank. The Navy at first refused because it feared that the requested process change would result in delay. Once the Yard, two and a half months later, provided more details, as well as a proposed drawing revision, the Navy approved the requested change. NNS claims that the change was implemented too late to be used on DLGN 38 and 39 and therefore that it was entitled to compensation for the amount that would have been saved had it been able to use the piggyback method on those two cruisers.

The problems recounted by NNS in this item had nothing to do with defective specifications. The contractor had prior experience with the fabrication techniques and was aware, or should reasonably have been aware, of the fact that excessive heat could result in melted polyethylene and unbonded lead. The applicable shielding drawing, 842, was in the hands of the

contractor prior to contract definitization and included certain notes which specified that temperatures for polyethylene and lead were not to exceed specific limits that were classified as confidential.

In addition, for bidding purposes on the DLGN 38, NNS had been given NAVSHIP's drawing 245-4444872. Paragraph 3.1.2 of that drawing stated:

> Plastics [polyethylene] are flammable materials. Normal fire hazard precautions should be observed during handling and storage. During installation when the plastic is located close to welding or burning operations, it should be protected by a flameproof material. Edge bonding of slabs (or other structural work requiring high heat) in adjacent areas must be complete before plastic is installed unless precautions are taken to prevent the possibility of damaging the plastic.

Thus, it is clear that NNS knew prior to definitization of the contract, that the polyethylene layers and lead slabs could be damaged by excessive heat. The fact that excessive heat damage did occur resulted not from the fact that the drawings or specifications were defective, but from the fact that NNS ignored the caveats against excessive heat. NNS attempted to fabricate the shielding layers at too fast a rate, which resulted in excessive heat generation.

Furthermore, the fabrication and installation sequence is not dictated by the Navy through non-deviation drawings, but rather is determined by the contractor. That the Yard was in fact aware of the potential problems at the time of contract definitization is indicated by the fact that it increased the contract price by 60 percent to take account of the anticipated slow rate of fabrication.

It is significant that NNS' original correspondence and LAR did not suggest that the Navy's design specifications were defective. It was only in March 1974 that NNS first indicated that the specifications might be defective and that the work resulting from approval of the LAR "might not be within the scope of the contract." It is interesting to note that March

1974 is around the time that the Contract Controls operation was set up with Willis as its head.

Furthermore, as to the claim regarding the lead fissures, NNS recognized that bonding techniques are an "art" dependent on worker techniques and not susceptible to written specifications. NNS conducted an investigation into the qualifications and performance of its lead burners to determine whether NNS could reduce the number of defects, thereby saving production costs, and to support NNS's request that the Navy accept defects that could no longer be discovered. It should be noted that after NNS's investigation and implementation of corrective action, no further reports of unbonding or requests for acceptance of lead bond defects were made. Thus, the cost of NNS' investigation of its lead burners should not have been charged to the Navy.

As to the claim regarding the delayed implementation of the "piggyback" method of lead installation on the primary shield, two observations may be made: (1) the requested change was made to facilitate NNS's construction; and (2) the original design was feasible. Besides the guidance drawing, NNS received the non-deviation working drawings on July 27, 1971, prior to contract definitization. Thus, NNS should have recognized a need to suggest any alternate methods which would facilitate its construction. After the initial rejection, NNS waited 2-1/2 months before it submitted further documentation to support its request, which was finally approved.

Another interesting aspect of this claim is that the issue of a contract change for portions of this work was thoroughly and formally documented and discussed between NNS and the Navy at the time. It was apparently resolved in discussions with the Senior Vice President for Contracts and the Vice President for Engineering, who agreed to cancel a prior letter identifying a contractual disagreement and potential request for a contract adjustment. Both the contractor's prior letter and the letter formally withdrawing it were signed by the Director of Contract Controls, Willis.

NNS's claim cites the correspondence relating to this matter at length, including the letter identifying the contractual disagreement. However, it omits the fact that the Yard formally cancelled that letter. Thus, besides the possible fraud in the claims write-up regarding NNS's conclusion that the problems resulted from defective specifications, this is another example of an apparently deliberate omission of a material fact that, if revealed, would have cast serious doubt on the validity of the claim.

VI. THE PROPOSALS FOR EQUITABLE ADUSTMENT ARE "CLAIMS" WITHIN THE MEANING OF 18 U.S.C. §287 AND THE STATUTE OF LIMITATIONS DOES NOT BAR AN INDICTMENT BASED ON THE FILING OF THOSE CLAIMS

1. Newport News contends (CM 40-51)48/ that its proposals for equitable adjustment are not "claims" within the meaning of 18 U.S.C. §287 and that it is therefore not subject to prosecution under that section of the criminal code. This contention is frivolous.

The forerunner of Section 287 was enacted in 1863, as part of the False Claims Act, "following a series of sensational Congressional investigations into the sale of provisions and munitions to the War Department." United States v. McNinch, 356 U.S. 595, 599 (1958). As the Supreme Court explained in McNinch (ibid.),

> [t]estimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury.

Although the False Claims Act (hereinafter "the Act") was enacted specifically to prevent military contractors from plundering the public treasury (see also 356 U.S. at 599-600, n.9), the statute's prohibitions have been broadly applied "to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud." United States ex rel. Marcus v. Hess, 317 U.S. 537, 544-545 (1943). "Debates at the time suggest the Act was intended to reach all types of fraud, without qualification,

that might result in financial loss to the Government." United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)(emphasis added).

The Supreme Court "has consistently refused to accept a rigid, restrictive reading" of the Act, even though it "impose[s] criminal sanctions as well as civil." Ibid. For example, in United States v. Neifert-White Co., supra, a civil action to recover statutory forfeitures, the question was whether the Act applied to the supplying of false information to the Commodity Credit Corporation in support of a loan application. The district court dismissed the action on the ground that an application for a CCC loan, as distinguished from a claim for payment of an obligation owed by the Government, is not a "claim" within the meaning of the Act. The court of appeals affirmed the district court's decision but the Supreme Court unanimously reversed. The Court held (390 U.S. at 233; emphasis added) that the statute "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." The Court distinguished its prior decision in United States v. Cohn, 270 U.S. 339 (1926), on the ground that Cohn involved a fraudulent application to obtain the release of merchandise which belonged to the claimant and which was being held by the customs authorities as bailee only. The Court observed (390 U.S. at 231; emphasis added) that Cohn "did not involve an attempt, by fraud, to cause the Government to part with its money or property, either in discharge of an obligation or in response to an application for discretionary action. 49/

The breadth of the Act is also illustrated by the Court's decision in United States ex rel. Marcus v. Hess, supra, a qui tam or informer suit brought in the name of the United States. The respondents were electrical contractors employed to work on P.W.A. projects in the Pittsburgh area. Their contracts were made with local governmental units rather than with the United States government, but a substantial portion of their pay came from the United States. Respondents submitted monthly estimates for payment to the local sponsors on P.W.A. forms. While the estimates themselves were apparently truthful and

accurate, the contract price was inflated because of a prior collusive bidding scheme. The Supreme Court held that the monthly estimates were fraudulent claims "well within the prohibition of the statute." 317 U.S. at 542. The Court explained (id. at 543-544):

> The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P.W.A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever the ultimate goal - payment of government money to persons who had caused it to be defrauded.

The Court added that the Act was intended to provide broad protection against those who would "cheat the United States", and that "the fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary." Id. at 544.

While the foregoing cases demonstrate that the statutory term "claim" has been interpreted broadly to reach "all fraudulent attempts to cause the government to pay out sums of money" (United States v. Neifert-White, supra, 390 U.S. at 233), it requires no such broad interpretation to encompass the conduct involved here. Rather, Newport News' proposals for equitable adjustment lie at the very core of the conduct Congress sought to proscribe in the Act.

Newport News concedes (CM 41), as it must, that the proposals "assert[ed] the right to receive compensation from the government." Moreover the changes clause of the contract with Newport News (Article 29) uses the terms "claim" and "equitable adjustment" interchangeably.50/ See United States v. Wertheimer, 434 F.2d 1004, 1006 (2d Cir. 1970). Nonetheless, Newport News argues (CM 41) that its proposals were not "claims" because they were "incapable themselves of effectuating the payment of ... compensation" by the Treasury, i.e., the proposals first had to be evaluated and

approved by the Navy. This argument is nonsensical on its face. The Treasury presumably never pays claims against it without an evaluation of their validity by some government agency, however cursory. It was reasonable to expect that the Navy would closely scrutinize the unprecedentedly large claims amounting to nearly a billion dollars contained in the Yard's several proposals for equitable adjustment. But the fact that Newport News realized that its claims would not simply be accepted at face value and immediately paid out does not alter the fact that the proposals were claims for compensation. The Supreme Court has held that even an application for a government loan is a "claim" under the Act, despite the fact that the granting of the loan is a matter for agency discretion. United States v. Neifert-White Co., supra. A fortiori, the fact that Newport News may have envisaged its claims as subject to negotiation with the Navy does not alter their status as claims. United States v. Mastros, 251 F.2d 808 (3d Cir.), cert. denied, 358 U.S. 830 (1958).

A contractor may not excuse the submission of false claims to the government on the ground that it is willing to settle for something less than the full sum it initially demands. If this were not the case, then the very purpose of the False Claims Act would be frustrated. Every contractor could escape liability for the submission of fraudulent claims to the Treasury on the ground that its claim, no matter how false, was deemed to be subject to negotiation. But this is plainly not what Congress intended, nor what the Supreme Court meant when it said that the Act prohibits "all fraudulent attempts to cause the Government to pay out sums of money." United States v. Neifert-White Co., supra, 390 U.S. at 233.

Newport News asserts (CM 40, 50) that the case law interpreting the False Claims Act has never applied the term "claim" to a proposal for equitable adjustment submitted by a defense contractor and that applying Section 287 to its proposals would expand the statute's reach "unforseeably and retroactively" in violation of the due process clause. Newport News complains (CM 50) that it has been "'lulled into the reasonable impression'

that the proposals were not to be treated as 'claims'", quoting United States v. Insco, 496 F.2d 204, 209 (5th Cir. 1974).

In view of the fact that there are relatively few reported cases that address the question of what constitutes a claim within the meaning of the Act, it is not surprising that no reported case specifically deals with Newport News' contention that a proposal for equitable adjustment submitted by a defense contractor is not a "claim". This does not mean, however, that the government's application of Section 287 is novel or unforeseen. Indeed, on April 6, 1977, another major shipyard was indicted under Section 287, on the basis of a similar fraudulent proposal for equitable adjustment. United States v. Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division, Crim. No. S78-00031(R) (S.D.Miss.)51/ Litton raised almost the same issue as Newport News raises here.52/ The district court in Virginia summarily rejected Litton's contention:

> Regardless of whether you call it a claim or an offer of settlement, or [an] equitable adjustment submission, the fact is that what is charged here is an assertion of an entitlement to money from the United States in May of 1972. That is a claim within the meaning of the statute which it is here charged was violated. That is within the statute of limitations, and, therefore the crime is not time barred.

May 20, 1977 Tr. of Hearing before Judge Albert V. Bryan, Jr. on Litton's Motion to Dismiss the Indictment, at p. 126.

It is worth noting that on appeal from Judge Bryan's dismissal of the indictment for prosecutorial misconduct, the court of appeals characterized Litton's May 1972 offer of settlement as a "claim" without discussion of the issue. United States v. Litton Systems Inc., 573 F.2d 195, 196 (4th Cir. 1978).

2. Newport News also contends (CM 22-26) that an indictment based upon the VCAS claim would be barred by the five year statute of limitations, 18 U.S.C. §3282. NNS reasons that because the VCAS claim was contained in the Proposal for Equitable Adjustment submitted on August 8, 1975, the statute of limitations ran out on August 7, 1980. Like Litton Systems, NNS takes the position that the statute of limitations begins

to run on a Section 287 charge as soon as the elements of the offense have been committed. However, as in the Litton case, we take the position that the statute of limitations begins to run anew when and if the contractor files a subsequent amendment of its claim or a new claim.53/ Thus, in our view, NNS' letter of August 1, 1977 (contained in our appendix as Ex. #15), which informed the Navy of changes in the projected final costs of all the ships for which the Yard had submitted cost overrun claims, had the effect of starting the running of the statute of limitations anew for each of the claims. The changes in the final cost figures would, of course, have altered the amount of dollars that each claim was worth, and therefore they constituted a material amendment to the claims as originally submitted. Similarly, the offer of settlement in the Litton case, filed some 18 months after the original claim had been filed, was accompanied by a downward revision of estimated final ship construction costs. The offer of settlement was held to be a "claim" within Section 287, which had the effect of extending the statute of limitations by 18 months. Judge Bryan therefore denied Litton's motion to dismiss the indictment on statute of limitations grounds. Unless Judge Bryan's decision in Litton was wrong, NNS' view of the almost identical statute of limitations question prsented here cannot prevail.

In any event, while the statute of limitations question presented by a prosecution for substantive Section 287 violations is not entirely free from doubt, Newport News has conveniently ignored the fact that we can indict the Yard and its employees for conspiracy to defraud the United States under either 18 U.S.C. §286 or §371. Because conspiracy is the classic continuing offense, an indictment under Section 286 or 371 would clearly present no statute of limitations question. Newport News does not contend otherwise, and Litton Systems, in its statute of limitations argument, conceded that had it been indicted for conspiracy rather than for a substantive violation of Section 287, there would have been no statute of limitations issue in the case.

The key count of the indictment we now contemplate will charge Newport News with a violation of 18 U.S.C. §286. It provides:

> Whoever enters into any agreement, combination or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The beauty of Section 286 is that 1) it makes obtaining payment from the government the ultimate object of the conspiracy, rather than the mere filing of the false claims; and 2) it has a ten year penalty provision, in contrast with the five year provisions in Sections 287 and 371.

We plan to show NNS's elaborate attempts to obtain payment on its claims. This part of the conspiracy included lobbying and testifying on Capitol Hill, and efforts to blackmail the Navy by threatening, inter alia, to withdraw entirely from the Navy's nuclear shipbuilding program. In view of the fact that Newport News is one of only two shipyards capable of building nuclear ships for the Navy and the only shipyard that builds nuclear aircraft carriers, such blackmail threats had to be taken seriously by the Navy. The threats are contained in letters from the highest officials of Newport News to Navy and DoD officials. One such letter, from former NNS President J. P. Diesel to Deputy Secretary of Defense William P. Clements, is included in the appendix as Exhibit #16. This letter is but one of several in our possession of like import. We intend to pursue this aspect of the conspiracy vigorously.

Under section 286, the statute of limitations would not begin to run until at least October 5, 1978, when the Yard and the Navy agreed to a lump sum settlement of the Yard's claims. Thus, an indictment would clearly not be time barred before October 5, 1983. Indeed, insofar as Newport News continues to assert a claim of entitlement to additional vast sums of money based on the original false claims, the conspiracy is one that continues up to the present time.54/ In its Confidential Memorandum, Newport News brazenly asserts two legal theories under

which it is entitled to seek additional compensation from the Navy. First, NNS argues (CM 143-155) that it is entitled to rescind the settlement it reached with the Navy and seek full compensation for all of its cost overrun claims because, by instituting this criminal investigation, the Navy has allegedly breached "an implied contractual duty to take no action which will impede the enjoyment by the Company of the benefits of the settlement agreement" (CM 152). The Yard contends (CM 156-169) in the alternative that it is entitled to additional sums of money for the 21 claim items that were, unbeknownst to it, "excluded" from the settlement by the Navy because they were regarded as probably fraudulent.55/ We have requested the Civil Division of Main Justice to evaluate the merits of these two contractual arguments. For present purposes, it is sufficient to point out that in the very same Confidential Memorandum in which NNS initially argues that a prosecution is time barred, it actually concludes by reasserting all of its original false claims, thereby extending the Section 286 conspiracy until the present time. By the same token, the Confidential Memorandum may also have the effect of either extending the statute of limitations on the original claims for purposes of a prosecution under Section 287, or may itself constitute the filing of a new group of false claims against the United States.

VII. CONCLUSION AND RECOMMENDATIONS

1. It is clear beyond cavil that the individual claims analyzed above are not only false and without legal merit, but that their preparation was purposeful and criminal.

Moreover, when the individual claims are evaluated against [redacted] a broadly based conspiracy, and against each other as well, it is apparent that NNS approached the claims effort with the singleminded purpose of inflating the claims to the greatest extent possible. The inference is inescapable that NNS' plan was to make the claims huge enough to choke the Navy's normal procedural mechanism for their orderly review. The claims could then be settled en bloc, through horse-trading -- a

process that would allow the Yard to collect millions of dollars on claims that had no merit. This in fact happened.

The conspiracy we have uncovered is staggering in its size and complexity. NNS' claims effort was perhaps the largest assault on the Treasury in American history. Because of the sheer size and complexity of its claims, and because the government lacked the immense resources required to litigate each claim in court, NNS' scheme succeeded. The Navy settled the claims for $208 million. The evil inherent in the conspiracy to defraud the government was exacerbated by NNS' use of extortion tactics to pressure the Navy into agreeing to a settlement of its claims. In essence the Yard held the Navy's nuclear shipbuilding program, and hence the national defense, hostage until the Navy agreed to a favorable settlement of its claims. This successful effort to defraud the United States warrants the best effort the government can muster to bring the Yard and its employees to the bar of justice.

Statute of limitations considerations make it advisable that the investigation be concluded by late spring or early summer 1982. Otherwise, we may not be able to bring substantive 287 counts. Obviously, because of the sheer number of claims and the short time remaining, most of the claim items cannot be investigated at all, much less with the thoroughness given the VCAS claim. However, we can pursue the several claims discussed in this memo within the time remaining, as well as [redacted] provided that the present investigative team is not sidetracked with other case assignments. Of course, we do not want to return an indictment on one claim item alone. Several individual claims must be included to show a pattern, to dispel any argument of mistake, and to demonstrate the existence of the overall conspiracy.

Much the time lost in the investigation to date must be attributed to lawyers playing "musical chairs" and to an overly compartmentalized approach to the case by the several attorneys who earlier participated in the investigation. Almost as soon as a Main Justice attorney got deeply involved

in the investigation he or she would disappear to work on other cases. In addition, the Justice attorneys relied too heavily on the Navy attorneys to conduct detailed grand jury investigation which they later failed to assimilate. The Navy attorneys were often lost in the field of criminal law and frequently appeared to receive little or no guidance from the Justice Department attorneys.

The Navy attorneys were reluctant to express their bottom line views on various claims, and on the occasions when they did so their views were often disregarded, as in the preparation of the initial pros memo. This lack of continuity of counsel was noted by Judge Merhige on April 22, 1981, when he ruled against NNS' motions to quash the enforcement of existing subpoenas, and to terminate the grand jury investigation [redacted]

2. In addition to continuity of assignments, we need paralegal assistance to digest the grand jury testimony and organize and assemble documentary evidence. [redacted] The United States Attorney's Office for the Eastern District of Virginia can provide one paralegal; we request one additional paralegal assistant from the Department.

FOOTNOTES

1/ The cost overrun claims are contained in separate "proposals for equitable adjustment" on four ship construction contracts. The claims were referred by the Navy to DOJ for investigation. NNS' proposals for equitable adjustment related to contracts numbered N00024-67-C-0375 (2 aircraft carriers), N00024-69-C-0307 (2 637 Class attack submarines), N00024-71-C-0270 (4 688 Class attack submarines) and N00024-70-C-0252 (3 guided missile cruisers). Each proposal for equitable adjustment contains many separate claims of entitlement. Generally, each claim is separately analyzed and priced out. NNS' claims effort was prodigious. Some 1500 NNS employees were involved in the preparation of the claims. The claim books, stacked together, are thicker than the Encyclopedia Britannica and much more technical.

2/ Copies of this preliminary prosecution report as well as spade memos prepared by attorneys in the Fraud Section of the United States Attorney's Office, Eastern District of Virginia, have been submitted to . at the Department of Justice.

3/ The preliminary drafts revealed a careful massaging of fact and legal theory by claims writers to create a final version that could be expected to pass muster with the Navy. An analysis of these crucially important preliminary drafts is contained in Part IV, Section 4 of this memorandum.

4/ [redacted]

5/ The present team's investigation has thus far focused almost entirely on the DLGN 38-40 cruiser contract claims for practical reasons that have nothing to do with the relative merits of NNS' cost overrun claims on the various ship contracts. Thus, we have no reason to believe that the claims on the aircraft carriers and submarines have more integrity than the cruiser claims.

6/ The proper unit of prosecution is a difficult question we have not yet researched. It may be that each proposal for equitable adjustment constitutes a single claim for purposes of prosecution. Alternately, each separately priced claim item within the proposals may provide the basis for a separate Section 287 count. See generally, United States v. Bornstein, 423 U. S. 303 (1976).

7/ Deleted

8/ Deleted

9/ The changes clause is found in Article 29 of the DLGN 38-40 contract. It is set forth on pages 9-11 of the CITAR (Ex. 814) in the appendix.

10/ Section 8d of the Contract Disputes Act of 1978, 41 U.S.C. §607, has expanded the jurisdiction of agency boards of contract appeals. These boards now have the power to decide all claims relating to a contract and may grant any relief to which the contractor would be entitled if asserting a claim in the Court of Claims. Accordingly, breach of contract claims may be settled by the boards.

11/ Bruce Constr. Corp. v. United States, 163 Ct. Cl. 97, 100, 324 F.2d 516, 518 (1963).

12/ Contract Disputes Act of 1978, 41 U.S.C. §605.

13/ See DAR §1-314(d).

14/ DAR §7-103.12(a), para.(a).

15/ Navy experts prepared CITARS on each of the multitude of claim items. Needless to say, the time, effort and money spent in their preparation was prodigious. Without exception, the CITAR's we have reviewed represent meticulous research and analysis, and provide a sound basis upon which to commence investigation. The CITAR on the Control Air System is included in the appendix as Ex. #14.

16/ Neither of these two systems are to be confused with the "reactor plant control air system." As the Navy's experts note in footnote 1 on page 8 of the CITAR: "The reader's attention is called to the fact that the reactor plant control air system in both CGN-36 and CGN-38 is not the reactor compartment ventilation control air system." The reactor plant control air system controls reactor plant components other than the ventilation valves and is a separate system.

17/ Deleted

18/ All the relevant specifications relating to the reactor compartment Ventilation Control Air System are included in the appendix as Ex. 13.

19/ Hereafter guidance plans (also known as guidance drawings) shall be referred to by their last three digits.

20/ Specification Section 9490-1-d provided only that the DLGN 36 ships' "high pressure air system shall ... serve the reactor plant control air system." By contrast, specification Section 9490-1 for the DLGN 38 class ships made it clear that the high pressure air system was to service both the reactor plant control air system and the reactor plant Ventilation Control Air System (VCAS).

21/ Deleted

22/ Deleted

23/ Rev. B. was prepared by the Navy's design agent, Electric Boat Division, of Quincy, Mass. Rev. B. is referred to by NNS as E[lectric] B[oat] Drawing 38643-01X01.

24/ HMR-145 at paragraph R. HMR means Headquarters Modification Request.

25/ [redacted]

26/ Through 40/ deleted.

41/ Thus, the total amount of money included in the bid proposal for compliance with OSHA and EPA requirements was $6,256,608.

42/ Apparently, there was further communication between the Navy and NNS regarding these additional costs. In a memorandum dated August 11, 1971, to the Defense Contract Audit Agency, the Yard responded to a number of questions raised by the Navy regarding the July 1971 proposal. The letter is signed by a J. E. Ware, Assistant Cost Engineer, with copies to Mr. E. A. Brown, D.C.A.A.; Mr. C. L. Willis; Mr. C. E. Dart; and the Cost Engineering Department.

43/ The government can agree in a contract that it will do no sovereign act that would hinder the private contractor in the execution of the contract and that if it does so, it will pay the other contracting party the amount by which its costs are increased by the government's sovereign act. Amino Brothers Company v. United States, 372 F.2d 485, 491 (Ct. Cl. 1967). However, the cruiser contract has no such clause. In its OSHA and EPA claims the Yard maintained that the contract did in fact contain such a clause. The Yard cited Clause 75, entitled "Health, Safety and Fire Protection", which was added to the cruiser contract by Supplemental Agreement P00007 on December 21, 1971. But the Yard ignored the fact that Clause 75 is limited to increased costs caused by compliance with new regulations and requirements "with respect to the risks described in the Article of this contract entitled 'Nuclear Risk -- Indemnification Under P.L. 85-804.'" The Yard's claim narratives quote Clause 75 selectively in order to give the misleading impression that the sovereign act provisions relate to all government health and safety regulations.

44/ During this same period, Newport News was diverting some of its employees for the purpose of constructing oil tankers at its new civilian Yard. It fails to mention this fact in its narrative.

45/ NNS filed what was described in the earlier pros memo as a "mini-claim" on the 688 submarines in 1975, expecting a quick settlement. When settlement discussions failed, NNS filed a claim in 1976 for twice the amount. That claim is described as the "maxi-claim" in the first pros report.

46/ In each claim, NNS indicated that its financing costs were not traced to any specific ship contract.

47/ We do not know what the 5% add-on represents.

48/ "CM" refers to the Confidential Memorandum recently submitted by Newport News Shipbuilding and Dry Dock Company to the Department of Justice.

49/ See also United States v. Mastros, 257 F.2d 808,809 (3d Cir.), cert. denied, 358 U.S. 830 (1958), holding that a settlement proposal was a "claim" against the Army within the meaning of Section 287 because it "sought the collection of money from the U.S. Treasury."

50/ In a hearing before Judge Merhige, counsel for NNS stated that "when I say claim, I mean request for equitable adjustment, a term we use interchangeably."

51/ Counsel for Newport News also represent Litton Systems and thus cannot be unaware of the Litton case.

52/ Litton did not even contend that its Proposal For Equitable Adjustment was not a "claim". Rather, it made the slightly more plausible argument that a letter dated May 1972, in which it offered to settle its outstanding claim (i.e., the Proposal) was not itself a claim within Section 287.

53/ Indeed, at least two cases have held that the deposit or presentation for payment of a government check to which the depositor was not entitled is a false claim against the United States within the meaning of Section 287 and the civil false claims statute, 31 U.S.C. §231. United States v. Branker, 395 F.2d 881, 889 (2d Cir. 1968), cert. denied, 393 U.S. 1029 (1969); Scolnick v. United States, 331 F.2d 598 (1st Cir. 1964).

54/ Assuming that counsel for Newport News are aware of the false character of the claims, they would be subject to prosecution as co-conspirators under Section 286, and very likely under Section 287 as well.

55/ We do not yet understand why the Navy chose to exclude only those 21 claim items from the settlement, since the Navy CITARS indicate that some degree of fraud was involved in the majority of the 260-odd claim items.

Senator GRASSLEY. Senator Specter.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

At the outset, Mr. Chairman, I commend you for the diligence in considering this matter in your capacity as the chairman of the Judiciary Subcommittee on Administrative Practice and Procedure, and I can personally attest to the outstanding job that you have done in chairing that committee on which I have served for 4 years, and I similarly commend Senator Proxmire who in his capacity as vice chairman of the Subcommittee on International Trade, Finance, and Security Economics of the Joint Economic Committee on the very important matter that is before the joint committee hearing here today.

In my own judgment, it is especially important that there be oversight by Congress of the Department of Justice, simply the reasonable limitations of a matter especially relating to the Department of Defense and general policies.

When we have a Department of Defense authorization bill and appropriations bill now in the range of $292 billion, it is very important that, as an aid to the management of DOD, that there be criminal prosecutions where appropriate. It has become a massive operation as we sought to utilize management principles in the overall control of the Department of Defense budget and that budget has increased from $169 billion in fiscal year 1981 to a figure in the range of $292 billion at the present time, and it is a mammoth undertaking to administer and we see the illustrations of problems which are necessarily pressing in the Department of Defense and the enormity of the job. That is why it is especially important that criminal process be used where appropriate to deter wrongdoing. It is simply not possible to go over every single transaction to see to it that the defense contractors obey the law because there are so many.

The burden of the criminal law is to move ahead and prosecute and to deter others, and it is in this context that I think these oversight hearings are especially important.

It should be noted in terms of Assistant Attorney General Stephen Trott that he is a relative newcomer to this process and that a good bit of what has been referred to so far involve actions of the past and which Mr. Trott was not a party to. Of course, his responsibility, as he is here today, is to make a response in terms of his being Assistant Attorney General at the present time.

I would focus on only one item which Mr. Trott has identified in his letter of September 28 in a continuing effort to try to reach some accommodation, where Mr. Trott writes to Senator Grassley relating to his concern about not producing internal information. He says at page 3:

> This policy is based on the fundamental need for independent, objective prosecutorial judgments to be made in an atmosphere where attorneys are free to express all opinions and to weigh and analyze all possibilities openly. Such an atmosphere can only be achieved where the deliberative process is protected from the inhibiting effects of subsequent evaluation away from the context of prosecutorial consideration.

I would say, Mr. Trott, that I appreciate the fact that you are identified as an experienced prosecuting attorney, as myself, and it

is a matter of some delicacy to balance, but I do believe that the Judiciary Committee has an oversight responsibility and an oversight prerogative in terms of what is being done in the Department of Justice, and I do believe that we have to exercise a balance in prosecutorial discretion.

In terms of the comments that have been made today about grand jury information, this incident may well provide the basis for some reform of the law on that subject. The purpose for having grand juries meet in secret I think is not comprehended where the Congress makes an inquiry in connection with our oversight work on the Department of Justice, and it may be that if the current laws limit what we can get in an oversight hearing, that we will choose to modify the laws of secrecy. We could say our rules of criminal procedure are subject to congressional determination. The Congress ought to have access to secret grand jury information for our oversight responsibility. That presumes that we have a right to receive secret information, which I think we do. So if we find in this inquiry that the existing law is too narrow to circumscribe, that is a matter that we may well seek to address and think about change in Federal law of grand jury secrecy.

But I concur with my colleagues, Senator Grassley and Senator Proxmire, on the importance of the hearing. I am sympathetic to the considerations that you have made, Mr. Trott, especially that you have been called to the fore under oath on a voluminous file which is not really of your own making. But I do think it is important that we proceed.

Thank you, Mr. Chairman.

Senator GRASSLEY. Before we proceed with Mr. Trott's testimony, I have a statement on the part of the subcommittee that I would like to make in my capacity as chairman of the subcommittee. I would like to lay it out more clearly than I have in the past, Mr. Trott, on our purposes for this hearing.

Oversight and review of the Federal departments is a necessary function of the legislative branch. This hearing represents a first step in the oversight process of the Justice Department's handling of three shipbuilding cases—those referred to by Senator Proxmire and which appear in the display chart.

My recent dealings with the Justice Department are suspiciously similar to resistence I have encountered with the Department of Defense. From DOD I have gotten nothing but bureaucratic games, bureaucratic semantics, and bureaucratic coverups.

This subcommittee has received testimony and evidence of Defense Department retaliation against some of its most diligent employees, of coverups of gross over-pricing and quality-control problems, of obstacles to the flow of information to Congress and of general administrative abdication.

The only response to this evidence from the Pentagon has been happy talk. No countervailing evidence. No corrective action, just plain happy talk.

The only thing I have learned while pursuing information from a bureaucracy is where there is smoke there is usually fire.

I do not know yet if that is the case with the Justice Department, but this subcommittee has a responsibility to find out and it intends to find out.

In this present matter before us, we begin a review of the Justice Department's handling of three shipbuilding cases.

In addition to press accounts and statements by Mr. P. Takis Veliotis regarding the General Dynamics case, we have reviewed the Department's own study called Review of Navy Claims Investigations, which was dated July 22, 1983, which itself criticized the Department's handling of shipbuilding cases. And we know from Justice's own record that it rarely finds sufficient evidence against large corporations.

After reviewing the available evidence and in exercising our function of oversight of Justice Department practice, these two subcommittees requested the Department on August 9 all prosecutors' memoranda and other documents related to the three shipbuilding cases.

Since that time, we have received no documents from DOJ. Instead, we were given refusals. Some of the refusals have been polite, some not so polite. We have been told, in effect, three things at various times: One, that a separation of grand jury material, per our request, was not performed; two, that the grand jury information is "too intertwined" to make redacting possible notwithstanding legal precedent; and, three, that it is the "very strongly held policy of this Department that prosecution memoranda and internal deliberative documents should not be released outside of the Department."

This morning we are releasing documents which contradict what we have been told by the Justice Department.

First, grand jury information had been redacted from certain memoranda pertaining to the Newport News case.

Second, grand jury material was hardly intertwined.

And third, these documents were, in fact, given to an agency outside the Justice Department.

These memoranda were prepared by six separate prosecuting attorneys closest to the investigations. Their conclusions are varying, and their arguments convincing.

These documents urge in the strongest possible terms that prosecution be pursued now. Absent countervailing evidence, serious questions remain to be answered.

Just 2 days ago, after Justice finally decided we were serious about pursuing this review, the Department delivered another, more extensive letter, but again contradicted itself.

The letter stated that DOJ had acceded to our request. On the contrary, it did no such thing. What we really got were delays, excuses, and DOD-type happy talk.

Initially, a window was left open on access to the Lockheed case. The September 7 letter we received from Mr. Trott stated, "the Lockheed case may not be as completely intertwined with grand jury material."

In the new letter, dated September 28, the window shifts from Lockheed to Newport News. This occurs, of course, after we had secured the Newport News memoranda from other sources.

The new letter indicates the process will begin soon, through Federal court, to give us redacted Newport News memoranda, this in defiance of legal precedence.

Meanwhile, Lockheed shifts to the back burner, for reasons of time and resources. And the General Dynamics case is reopened and therefore remains untouchable. Three cases—three excuses. That is not, in my words, acceding to our request for information. That is called stonewalling, just plain old stonewalling.

So that there be no doubt, I would like to insert for the record the entire history of our correspondence with the Justice Department related to this matter.

The bottom line is this: The evidence does not favor the Justice Department. The internal Justice study, press accounts, and public statements by Mr. Veliotis and others, and the Newport News documents we will release today all contradict assurances from the Justice Department that it has done a competent job of investigating these three cases. And I will emphasize, as Senator Specter did, that this is over a period of more than one administration.

We have seen nothing from Justice to counter these points. All we get are excuses, delays, and contradictions. Only discussions of policy and practice were offered, of reopened cases, and of insufficient evidence. It is clearly a case of evidence versus nothingness.

This subcommittee not only has a right but an obligation to review Justice Department practice, particularly when the evidence contradicts what we are hearing from the Department.

Beyond jurisdiction, there are other legitimate and substantive grounds for our continuing to investigate these cases. There are legal, constitutional and legislative grounds and these will be discussed during the course of today's hearing.

But perhaps the most pertinent grounds now for pursuing our investigation is that of suspicion, arising from contradictions we have already encountered.

What about other documents and other cases? The assurances we have been given, as well as future assurances, can no longer be trusted. What kind of relationship can exist now between Congress and the Justice Department since the basis for trust has been violated?

My greatest fear is that this kind of activity feeds a cynicism and growing mistrust in our public officials and institutions that leaves a lasting impression, a bad case of political halitosis.

As previously indicated, this subcommittee is obliged to pursue this matter and it fully intends to.

Since no other Senators are present now, I turn to our witness, Mr. Trott. You may proceed.

Mr. TROTT. Thank you, Mr. Chairman. First, Senator Proxmire, let me thank you for redacting the names of the individual attorneys that were involved in the reports. That is a sensitivity which we appreciate and I just want to tell you that we are grateful for that.

Second, I wish to, in view of my statement to you earlier that we have not brought the documents that have requested today, to go into some greater detail on that, with your permission, Mr. Chairman, on the record. Is that appropriate?

Senator GRASSLEY. Yes.

Mr. TROTT. On September 28, as you made reference, I sent directly to you, because we had been discussing this, a letter that indicates as follows:

DEAR SENATOR GRASSLEY: I am sorry that you declined to meet with me or the Associate Attorney General today to discuss the intentions of the Department of Justice with respect to the hearing before the Administrative Practice Subcommittee on International Trade, Finance, and Security Economics of the Joint Economic Committee on October 1, 1984, which you have asked me to attend. Had you met with me, I would have advised you that I have reconsidered your request for the documents you have requested in connection with this hearing and determined upon reflection that the materials that you have identified on two of these matters, subject, of course, to the restrictions of rule 6(e) of the Federal Rules of Criminal Procedure prohibiting disclosure of grand jury material, shall be made available to you for your use and consideration.

In that respect, Senator Specter, the observation you made earlier I think is appropriate. As I discussed with Senator Proxmire during my last appearance before him up here on the Hill, rule 6(e) does prohibit you from getting access to information which you very well may need in order to evaluate these crucial issues. And I suggested myself to Senator Proxmire that the remedy for this may very well be in legislation to enable you to conduct appropriately your oversight function.

Back to my letter:

What I wanted to discuss with you, Senator Grassley, was the procedure by which this delicate process of turning over to you the documents that you have requested will be accomplished.

As I indicated to you in my letter of September 7, 1984, the paperwork, documents, memoranda, and deliberative material on the Newport News case are replete with grand jury material. The case itself involves an estimated 250,000 documents—

And I am advised this morning that most of those have been turned back over to Newport News, which is standard procedure after a grand jury investigation—

And 6,000 pages of grand jury transcripts. At various times, 15 lawyers worked on the case and contributed to the memoranda. Under the circumstances, sorting out grand jury material from non-grand material has turned out to be an arduous and a difficult process, especially since many of the contributors to the files no longer work for the government. In many instances, decisions as to whether something is grand jury material have been simple, and that information can be—

And will be—

made available to you.

In other instances, however, the issues are not at all clear. I am advised by lawyers on my staff that a resolution of these issues by a court is imperative before we can fully respond to your request. For our protection, for yours, and most importantly in the interest of following the law and respecting the rights of those who were under scrutiny in the grand jury process, we have determined that a motion for supervision and guidance in this uncertain area shall be filed as quickly as possible in the appropriate Federal district court. It is the Federal court that supervises this process, and to avoid possible errors that might result in a contempt of court, I believe this is the appropriate vehicle to resolve these issues.

We will, of course, respect the final judgment of the court and make available to you on the Newport News case any material that is not guarded by rule 6(e).

There is ample precedent for taking this course of action. In the case of In re Grand Jury Empanelled October 2, 1978—

A copy of which I include for all members of this committee for ease of reference—

Such a motion was made, and the court expeditiously issued an appropriate order. I have included with this letter a copy of the court's opinion for your examination along with additional material from the Department of Justice regarding rule 6(e)—

This morning I have consulted with John E. Keeney, the principal deputy who was the lawyer who handled that motion. These are the documents which I have referred to in my letter that relate

to the file in that case. I have talked with Mr. Keeney. I have now gone over—and parenthetically he was out of the office last week—what the procedures are in an operation like this and they essentially amount to a friendly lawsuit where in the Justice Department and the Senate are combined and go into court for guidance. That is our suggestion in this case in order to make sure, as I said before, that we respect the rights of everybody involved in this matter.

I might bring to the attention of the committee in that respect that there has already been one lawsuit brought by Newport News against the Federal Government in this investigation. I suggest in order to preclude another such lawsuit that this is the appropriate way to proceed. This is the way the Senate has handled this before, and this is the way the Justice Department thinks it ought to be handled now. It will result in an expeditious decision as to the manner in which our deliberative internal documents shall be handed over to you. [Resumes reading:]

Obviously, this process will involve the careful redacting of documents under the guidance of the court. We are prepared to do this even though it will divert the attention of our Fraud Section attorneys away from active investigations on other important cases.

If I could jump down:

I also wanted at our meeting to impress upon you the difficulty and the frustration of working with redacted documents. When you get the final product, whole pages, paragraphs, and sentences will be missing—

As they have been in the documents that you have already gotten from GAO—

To the extent allowed by law, we hope to be able to augment your understanding of this case through oral briefings—

And supplementation to all the members. And I might include in that respect that you have now just a small portion of the internal documents and memoranda that relate to this case.

It is my belief and the belief of the department that when you obtain all of the material and all of the memos, including the memos written by the many employees who decided that this was not a prosecutable case, at the very least you will understand and hopefully appreciate the reasons why it was the final judgment of the Justice Department in connection with Newport News and Lockheed that these cases could not go forward.

As Senator Specter indicated, a grand jury investigation and a prosecution surely is necessary where appropriate, but I fully believe that Senator Specter would also agree that when a prosecutor believes in the exercise of his or her best professional judgment that there is no case because the evidence is lacking, that it would be abuse of discretion to prosecute an innocent person simply to avoid any political fallout that might occur.

As I indicated also, Lockheed should be easy and we are going to attend to that as quickly as we can. Now, the third case involves General Dynamics/Electric Boat, and that provides us with an entirely different problem. As you undoubtedly know, although the statute of limitations had run out on the original claims, and the case closed, the investigation has now been vigorously reopened on a different but directly related basis. Because the case has been re-

opened, rule 6(e) of the Federal Rules of Criminal Procedure and its interpretation by the courts even prohibit me from advising you of the precise basis on which it has been reopened.

If this were a state prosecution, as Senator Specter knows, I could tell you the basis on which this has been reopened, but under rule 6(e) even that, for the protection of those being investigated, is prohibited from public scrutiny.

For a variety of reasons relative to the integrity of the law enforcement process, the department does not release any material that relates to open investigations that are actively being pursued before a grand jury. Such a release may jeopardize the integrity of the investigation, impede its progress, scare off witnesses, cause the destruction of evidence, and interfere with the constitutional and statutory rights of the people involved.

Just as soon as General Dynamics/Electric Boat is no longer in this sensitive and delicate posture, however, we of course will be in an entirely different position and will be able willingly to go through the same process of making available material to you that I described earlier in this letter with respect to Newport News. In effect, Senator Grassley, we are acceding to your request for information, but we are simply telling you with respect to the open case that delivery must wait until we are not in a position of conducting an open investigation.

I had also hoped at this meeting that I would be able to discuss with you the policy that the Department of Justice normally follows in not releasing internal documents.

Senator Proxmire, of course, has picked up on that, as has Senator Specter, and both of you seem to understand full well the mischief that this can cause in other cases which we are investigating now and in the future. I am confident in saying that I believe this committee in the exercise of its legitimate oversight responsibility can find a way to protect that interest of the Department of Justice while at the same time pursuing your own legitimate interests in making sure that the Department of Justice currently is programmed to handle these cases that in many respects involve numbers of dollars in claims brought against the Federal Government that truly only astronomers can comprehend.

Finally, the GAO has been commissioned to do a study. Senator Proxmire has met with them, as I believe have members of his staff. We have completed our initial submission which we promised by October 1. It sets out in detail the parameters of the investigations. I think that should be of some help to you and we will continue to cooperate with GAO to the extent that is possible.

Now, may I in closing—and I am sure that we will have some questions on this—beg to differ with you on one respect, Senator Proxmire, and that is with respect to your statement that you're not particularly here to talk about what is in place now.

Well, I hope we are here to talk about what is in place now we have done intensive internal examination of the capacity of the Department of Justice to respond to these enormous investigations.

As you point out on your chart—which, with your permission, I would like to refer to over there—these investigations involving Lockheed dealt with contracts that were awarded in 1963, 1964, 1965, and claims that were made in 1968 and 1969, referred to the Justice Department of 1974. The capacity of the Department of Justice to handle those claims is important.

The Newport News case was started in 1967. The claims were made in 1976 and your chart—I believe this is accurate in connection with my files—shows referrals to the Department of Justice by

the Navy in 1978. And then, of course, General Dynamics, the same process, was in 1978.

Since 1978 and now, the capacity of the Department of Justice to respond to these types of claims and to handle white-collar fraud against the Government has been completely changed.

A number of years ago, in September 1982, the Attorney General, in response to some of the memos that you referred to, criticizing the ability of the Department of Justice to respond quickly to these kinds of cases, established within the Criminal Division the Defense Procurement Fraud Unit. And as I indicated to you in one of my letters, in the area of white-collar crime, the No. 1 law enforcement priority of this administration is fraud against the Government and Government procurement fraud.

The purpose of this unit has been to serve as the principal prosecution enforcement vehicle in DOD-related fraud investigations. The unit incorporates attorneys from the Department of Justice as well as attorneys, investigators, and accountants from the Defense Department.

The unit's mission is to screen and manage the most significant defense procurement fraud investigations and cases. It is also responsible for handling directly the investigation and prosecution of as many cases as its resources permit. Many significant cases continue to be referred to the U.S. Attorney's Office for handling.

The Economic Crime Council has taken up defense procurement fraud as one of its No. 1 priorities and we are conducting seminars within the Defense Procurement Fraud Unit for other U.S. attorneys' offices in areas where these kinds of claims are filed, providing technical assistance to those offices where needed.

The present staffing of this unit, which is physically located in Alexandria, VA, is as follows: Four experienced Criminal Division trial attorneys, including one chief, one assistant U.S. attorney from the eastern district of Virginia, two Department of Justice Civil Division trial examiners, four attorneys on detail from the Navy, the Army, the Air Force, and the Defense Logistics Agency, four investigators on detail from Army CID, Navy NIS, Air Force OSI, and Defense Criminal Investigative Service, an FBI liaison representative and, of course, the entire white-collar capacity of the FBI has been made available to work on these kinds of cases. An MOU has been signed by the Secretary of Defense Caspar Weinberger, bringing together the DOD IG and the FBI on title 18 investigations, and we have also in the unit DCA auditors.

The present staffing therefore includes 11 lawyers, with increases expected within the next several months. Senators, this is a night-and-day change from the 1970's when these cases first wandered into the Department of Justice. We had a Fraud Section. We had very, very fine lawyers. However, none of them had any experience with the complexities of these kinds of cases. Recognizing that shortcoming on the part of the Department, we established this unit and now we have in place a career unit that can respond instantaneously to the problem. It has learned good lessons from the Newport News, General Dynamics/Electric Boat, and Lockheed experiences.

The defense procurement enforcement priorities that have been developed over the years are as follows: First, product substitution

cases, substituting a defective or lower quality item for that required by the applicable contract. Examples of recent cases include suppliers of defective parachute cord, undertested semiconductors and vehicle parts, defective armorplating, defective bolts to support aircraft wings, and second, labor mischarging and defective pricing. These are largely accounting cases involving false claims based on a falsification of work performed.

Examples of recent cases include the Sperry case, System Architect tried successfully in Boston, and Market Research in which the company plead guilty, and bribery cases and more along those lines.

So, yes, I agree that what has gone on in the past is very important because it is on the basis of what has happened in the past that we learn the lessons of today and the future. The noted historian George Santayana said that those who do not know what happened in the past will be condemned to repeat it in the future. We are confident that, based on our internal analysis of what has gone on, we are not in a position of that person who does not know what went on in the past and we hope that working with you we would be able to continue to learn lessons that will enable us to go forward in the future.

Finally, let me correct one misimpression that continues to exist, notwithstanding continuous attempts by the Department of Justice to correct this, and that is, Senator Proxmire, the Attorney General did not recuse himself from the General Dynamics case so that he could attend a launching of the boat. With all due respect, the Attorney General recused himself from the General Dynamics case because it was his belief that law firm work done by his old law firm for General Dynamics put him in a conflict of interest position with respect to General Dynamics, and he felt it was important, since his law firm apparently had done work for General Dynamics, that he not be in the decisionmaking line process.

I know that I have probably taken more time than expected. I thought it was important to set the record straight. At the risk of being redundant, Senator Grassley, let me tell you that just as soon as we have cut out 6(e) material from every document that you have referred to in Lockheed and Newport News, we will make this available to you and sit down to the extent possible to supplement this for you so that you will see that these are decisions that were not influenced by anything other than the evidence and the law. The decisions were made by people who are reasonable lawyers and whose judgment differed on some of these cases, but in the final analysis the three cases were appropriately decided.

The lawyers on these cases, although there was some disagreement at lower levels, came to the final conclusion at the management level that these were cases that were not supported by the evidence or the law, notwithstanding the opinion of everybody, that the entire equitable claims system itself leaves plenty to be desired.

Thank you.

Senator GRASSLEY. Just as I said in my opening statement, I think you have discussed three cases where we get three excuses. Now, you say you are going to, just as soon as possible, get this information to us. When is that going to be?

Mr. TROTT. Senator, we will sit down with any lawyer that you provide to us and the counsel for the Senate and we will go in and file a friendly lawsuit just as soon as we can type up the case.

Senator GRASSLEY. I have a point I want to make later on the lawsuit. In the meantime, I would like to point to your September 7 letter in which you indicated to Senator Proxmire and me that you would not release any of the documents that we requested on August 9. You stated that submission of such information would violate a very strongly held policy. Those are the words of the letter—very strongly held policy of the Department that such documents should not be released

Now, you also stated that in the Newport News case, that it is "clear that our files and memoranda * * * are so replete with grand jury material that redactions may well not be feasible."

I would again like to call your attention to the fact that some memoranda from the Newport News case were released outside of the Department as early as November 1983, nearly 10 months prior to your letter, and grand jury material was carefully removed from those documents at that time.

So my question to you then, is this contradiction a reflection of your office's integrity or competence?

Mr. TROTT. I am sorry, a reflection of our office's what?

Senator GRASSLEY. Integrity or competence, this contradiction?

Mr. TROTT. I cannot hear the last word.

Senator GRASSLEY. Competence. I think you did hear me but I have repeated it and now I think you understand.

Mr. TROTT. Senator, I do not take kindly to being accused of pretending not to hear what you said. I happen to have a bad hearing problem in my left ear. I did not hear the last word that you said. I will tell you when I cannot hear, and when I cannot hear I will not answer your questions.

Now, the normal policy of the Department of Justice is as stated, and Senator Proxmire knows this, we have gone over this problem many times. We do not release internal deliberative material. However, a policy is a policy, it is not a law, it is not a rule, it is not 6(e).

On one occasion in the past when our judgment was that matters like this ought to be released, we did exactly that. You will see, if you take a careful look at the case entitled "In re Grand Jury Empaneled October 2, 1978," that the Department of Justice's position was that the redacted memos should not be released because they are nothing more than confusing and misleading.

Now, when we went into court and discussed that issue, the court ruled that that is the problem of the Senate, not the Department of Justice, and I have agreed that we are going to let that be your problem and not ours and that we are going to try to the extent permitted by law to explain these memos to you. It was not a contradiction. It is our policy not to release these documents.

However, as I said in my letter, in view of your interest, in view of what this is now turning into, you are looking into the Justice Department itself, it is my judgment that it is best to take the lid off and let everybody see what it is for what it is and that is what we are going to do as soon as we make sure that it is being done in an appropriate way.

Senator GRASSLEY. For the record, these documents were nevertheless released. There are two separate but corroborating sources. the U.S. Attorney's Office and the General Accounting Office, and it included all grand jury information extracted from these documents.

Now, these documents I have here are the only evidence that we have and we did not obtain them through the Justice Department. And both Senator Proxmire and I have indicated that the prosecutors concluded ample evidence of wrongdoing existed and that prosecutions on several theories could be successful. We question why no such prosecutions were pursued.

The authors of some of the documents themselves raised the question, and I would like to quote again, as Senator Proxmire did, from the original report of the U.S. attorney charged with the investigation of the case, and I quote:

> It is clear beyond cavil that the individual claims analyzed above are not only false and without legal merit, but that their preparation was purposeful and criminal . . . The conspiracy we have uncovered is staggering . . . The Newport News claims effort was perhaps the largest assault on the Treasury in the history of the country . . . This successful effort to defraud the United States warrants the best effort the government can muster to bring the yard and its employees to the bar of justice.

Mr. Trott, does the Department always decline to prosecute on the face of a strongly worded recommendation from at least 6 prosecutors, its own prosecutors?

Mr. TROTT. When it is determined on review by senior career people that the recommendations are not supported by the facts, the answer is yes. And let me answer another insinuation that you made, and that is that these were released by the Justice Department and therefore our policy is not as stated to you in the letter.

The documents that you have were prepared by the eastern district of Virginia and they are a very small portion of the deliberative material in this case. You will get all of it just as soon as we go through this process. The release of those documents was made to the Navy by the eastern district, so that the Navy could in a continuing sense understand what we were doing in our attempt to upgrade our efforts to be able to cope with these cases, and also to explain to the Navy what was going on. These documents were not released to anybody other than the Navy. It was a violation of policy for the Navy to release those to GAO without our permission and I have so told the Navy and so indicated to GAO. But be that as it may. That is irrelevant. It was our policy to hold these internally. That was not an authorized release of information.

Second, let me just read you another section of one of the documents that I believe you have. I remind you that in the Newport News case, which you are referring to, the Richmond prosecution team began work in the summer of 1978. The first Richmond grand jury issued subpoenas in October 1978. The Richmond prosecutors consisted of assistant U.S. attorney (blank), two, Navy attorneys, special assistant U.S. attorneys (blank) and (blank), and Fraud Section attorneys (blank) and (blank), four and five. This is the first Richmond prosecution team involving U.S. attorneys from Virginia, the Fraud Section, and the Navy.

"After 18 months of investigation before two grand juries, the Richmond prosecutor recommended declination. The Alexandria team rejected that recommendation." So what you are dealing with here is a situation, as I described earlier to Senator Proxmire, a situation wherein, for the purpose of being charitable, reasonable people were in disagreement. This eventually went to the Fraud Section many years later where it was reviewed again.

I would simply ask you, Senator Grassley, to absolutely read and digest every word that you now have, but to withhold judgment on the integrity of this investigation until you have before you all of the internal documents that will explain why it was the decision of the senior people in the Justice Department—and I am talking now about Fraud Section lawyers who made the recommendation to the Assistant Attorney General in charge of the Criminal Division—that the case would not go forward.

Senator GRASSLEY. That is the type of information we are trying to get and to date this is the only information we have and you have declined to comply with our request for information so far and with your reasons given we obviously have to agree with your——

Mr. TROTT. And we will be delighted to sit down, as I have indicated, and try to go through this with you and explain it to you because, as Senator Specter will tell you, sorting out this information is complex. You are dealing with a situation which, I am told, involves 250,000 documents, and 6,000 pages of grand jury investigation came out of this case. If we cannot even get 15 lawyers to agree, I might ask how in the world are we going to get 12 jurors to agree when the burden of proof is beyond a reasonable doubt to the satisfaction of each individual juror? I am simply asking that you hold your final judgment on it until you see all the facts; and, second, that when you see the package that you will treat this in such a way, as Senator Proxmire already has, to protect the identities of the lawyers involved so that we will not find ourselves in a situation in the future where nobody is going to write anything, nobody is going to make a recommendation for fear that it will be quoted out of context, lifted out of context, and subjected to unfair scrutiny. The whole package will be yours.

Senator PROXMIRE. Will the chairman yield for just one comment? What you are asking, Mr. Trott, is for a 1-year delay.

Mr. TROTT. No, I am not.

Senator PROXMIRE. Sure you are. You are going to court for consideration of this and our estimate, the best advice I can get is that it will take 1 year.

Mr. TROTT. Who gave you that advice?

Senator PROXMIRE. A very competent counsel, Dick Kaufman.

Mr. TROTT. Well, I think that is one thing we can stipulate on, Mr. Kaufman is very competent. Mr. Kaufman, I would believe that we can sit down and draw up the paperwork, since I already have the matrix for this right now, and get this filed in court just as quickly as we can. The only other thing that has to be done is——

Senator PROXMIRE. May I say that the court already did this once and it took them a year to do it, the very thing you are talking about. The court did it.

Mr. TROTT. Let's beat that record.

Senator PROXMIRE. Here we go again.

Senator GRASSLEY. Well, these documents that we talk about that I mentioned that we have reflect the views of at least six Justice Department prosecutors. Included in those six attorneys are groups from main Justice as well as from the district attorney's office in New Orleans.

For the record, I would like to indicate at this time that these prosecutors have all been requested to appear as witnesses before our subcommittee. In this regard, they are now considered congressional witnesses and they are afforded protection under 18 U.S.C. 1505.

Mr. TROTT. Would you spell out what those protections are, Senator, for the benefit of the audience?

Senator GRASSLEY. Well, I have had to repeat this so often on the part of Defense Department employees that it would be very easy. They are protected from retaliation as a result of their participation from those within the Department.

Mr. TROTT. I can absolutely assure you that that is not an issue. But I would tell you that this raises the exact reasons why we have our policy. Now, with all due respect, you are going to get into career lawyers, and I can tell you that the past history has been that when this is done to career lawyers, the long-term effect—and I mean negative effect—on the ability of the Department of Justice to engage in the type of interchange of ideas and theories is seriously inhibited.

I would simply ask you, before you call the witnesses up before you to testify, that you first have the benefit of all the documents so that you will have the perspective within which to judge the——

Senator GRASSLEY. That is exactly what we want.

Mr. TROTT. I am delighted.

Senator GRASSLEY. Mr. Trott, in addition to our original request we also asked the Department to supply us with a list of documents pertaining to these investigations. Have you brought that list today?

Mr. TROTT. We could not have gotten together such a list at this time if we put the entire Department of Justice working on it. I am told that these documents are sprayed all over the Government. You are talking about documents that were pulled together from 1978. All documents, as I said before, our estimate of 250,000 documents, most of which in terms of originals have been returned to Newport News, copies of which now are piled in boxes that we have in the fraud section, and you can find copies in the FBI, and other places.

As I said, we are diverting the resources of the Fraud Section to try to go back and recreate this. Many of the lawyers who worked on this do not even work for the Government any more. We are doing our best and we will continue to do our best.

Senator GRASSLEY. Understand what we are most interested in is the memoranda of the Department that were prepared in order to decide whether or not this case ought to be pursued.

Mr. TROTT. We have those. They are being redacted now and I understand that most of the possible redactions have been done. The career lawyers who are responsible for that are working on

that. They worked on it over this weekend. They have been working on it for weeks and we believe that we will have this internal memoranda in condition so that they can put it together rather quickly for a judge's determination as to what is 6(e) and what is not 6(e).

Bear in mind, I think that this is the best way to do this because, if we are talking about time, the last thing that we need is for a lawsuit from people who are under scrutiny of the grand jury claiming that we are violating their rights in releasing 6(e) information. If we go into a court and get a decision up front as to what can be released and what cannot be released, that is the fastest possible way to get that information to you.

Senator GRASSLEY. Mr. Trott, I would like to quote you from an analysis that we asked the American Law Division of the CRS to do on our request for access to the Department of Justice records.

Mr. TROTT. I am sorry, Senator, the CRS?

Senator GRASSLEY. The Congressional Research Service.

Mr. TROTT. All right.

Senator GRASSLEY. I would also at this time like to enter the complete study in the record that I am quoting from at this point, and I quote:

> The information request involves the operations and management of the Department of Justice and the agency investigation of alleged violations of criminal laws. Such subjects are within the jurisdiction of the Judiciary Committee. Furthermore, the committee inquiry involves not only oversight of department actions, but also investigation of the need for reform of the laws involved in the transactions being studied. The department itself, in the review of Navy claims investigations prepared by the Office of Policy and Management Analysis, identified changes in the laws that in its view would facilitate resolution of claims and criminal prosecutions of law violators. The committees, therefore, have demonstrated need for the documents and a link between the documents sought and the subject of inquiry and a legitimate legislative purpose within committee jurisdiction.

How do we perform oversight in light of DOJ's delaying, and that it will take a long period of time to get this——

Mr. TROTT. Senator, I absolutely deny the characterization that we are delaying. That is not our intention in this. It is not mine at all. We are dealing with rule 6(e) of the Federal Rules of Criminal Procedure. An intentional violation of rule 6(e) can result in a Federal charge being brought against somebody for doing that.

I am talking about lawyers. When I am involved in releasing information, I want to make sure that I am not violating the Federal law. As I said before, in reading through these documents, the lawyers called me up and said we have situations on our hands in these memos where we do not know whether this is releasable, because what you have is a situation where you have 100 witnesses in a grand jury, 6,000 pages of transcript, and 250,000 documents. Then the lawyers sit down and they prepare a memorandum analyzing what they have, as you can well imagine, the memorandum refers in many instances to grand jury material. It talks about witnesses, it talks about exhibits, and you have to take those out of the memoranda.

Senator GRASSLEY. Are you telling me you are going to go to court or the Department is going to go to court on every question regarding 6(e)?

Mr. TROTT. Absolutely not. As I said in my letter, much of the information is absolutely clear and we already have working redactions done, but I am told that there are other aspects of this that are not that clear and the lawyers advise me that we handle this with the Senate exactly as it was handled before.

Senator GRASSLEY. Well, once we get hold of the ones that are clear, will you feel the necessity to go to court?

Mr. TROTT. I would not want those if I were you because you will get a three-quarters document instead of half of the document, and this is what I wanted to talk to you about last week and point up to you the difficulty of dealing with redacted documents. The documents that you have are redacted, and is it not true, Senator, that the documents that you have have missing pages, missing paragraphs, missing sentences, and missing words? Is that true with respect to the documents that you have?

Senator GRASSLEY. These are things for us to decide based upon the information that we get from you, for us to decide what is valuable to us and what is not.

Mr. TROTT. I am simply pointing out to you that you have redacted documents and that is what you are going to get from us, not out of any intention on our part but by law.

Senator PROXMIRE. Mr. Trott, you are one of the most unusual witnesses that I have heard in the Senate. You have been standing now for more than 1 hour and I do not think I have ever been—and I have been to thousands of—maybe not thousands, but many, many hundreds of hearings and I have never seen a witness do this. Is there a reason for this? Is it because you are on a higher level and you can look down on us?

Mr. Trott. I think better on my feet and I have a bad back.

Senator PROXMIRE. Those are pretty good reasons. Maybe I should stand up.

Mr. TROTT. If you have a bad back, maybe we could share doctors. I need some help.

Senator PROXMIRE. Well, it is not that bad.

First, I want to make an observation and then I am going to have some questions for you. Your reference to the new Defense Department Procurement Fraud Unit seems to me to be an old gag. It is the oldest gag in the bureaucracy. First, we are assured that any problem can be handled by the system. When the system fails and the defense contractor accused of cheating is proven to have cheated and to have gotten away with it, what does the bureaucracy do? It reorganizes and says we have a new program in place so the old abuses cannot recur, and of course they do. After a new round of congressional hearings, there is a new bureaucratic reorganization, and it goes on and on.

Our interest here is what happened, did the Justice Department do its job? Now, that means we have to go back and cover some history here—and I realize that you were not in the Justice Department when this happened, you have had to review that and we have asked you to do that before you came up here as a witness.

But going to the documents we have put in the record, the initial responsibility for the investigation resided in the U.S. attorney in Virginia and the main Justice Department in Washington, specifically the Fraud Section of the Department.

Now, one of the two lead attorneys in the Fraud Section, of the two attorneys, only one in the Justice Department had experience in criminal cases, yet when the grand jury phase of the investigation began in October 1978, the Department took that attorney off the case and gave him an assignment elsewhere. His replacement had little experience in criminal law and worked only parttime on Newport News. Can you explain this inefficient way Justice assigns attorneys to cases?

Mr. TROTT. Senator, I cannot. I have not asked anybody how the assignments were made. They are according to the chronology of one of the assistants and I have no reason to disbelieve the chronology. It is absolutely clear, as you pointed out, that there was a need for adjustment. I am really sorry that you call this just a new version of the old gag. I think if the Justice Department had not done anything, we would be up here getting criticized for not having a defense procurement fraud unit.

Well, we have done something. We have studied this thing to death and we have come up with a way of handling it and, Senator——

Senator PROXMIRE. But the way you establish credibility though is to do something on these cases, not just dismiss them.

Mr. TROTT. Senator, I have invited you twice to come over and see the new gag, and I would——

Senator PROXMIRE. The new what?

Mr. TROTT. Did you call the Defense Procurement Fraud Unit just a new version of the old gag? Twice I have asked you to come over and personally inspect the Defense Procurement Fraud Unit. When you and I and Mr. Kaufman and Mr. McConnell, I believe it was, met, I suggested that we would be delighted to have you come over and see the Defense Procurement Fraud Unit, talk with the Navy investigators, talk with the FBI people, talk with the Department of Defense, talk with the employess and decide yourself whether this is just a new version of the old gag or whether it is a good unit. I think it is a good unit.

Then later on I wrote you a letter and I indicated again that we would be delighted for you to come over and personally tour this, so that you will not have to take my word in a committee hearing. You can draw your own conclusions.

Second, we did address these problems that occurred back in 1978 and that is why we got rid of our old way of doing things. Now we have a unit, we have 11 lawyers in place whose job is to do nothing but this.

Senator PROXMIRE. Well, I think it would be interesting and pleasant to go over and make a review there or view the FBI, but I do not think it gives you a real understanding necessarily of whether you are doing your job.

Let me ask you this: In early 1980, no main Justice Department line attorney was in any way assigned to the case. No line attorney was assigned to the case until mid-1982. Do you agree that the turnover in Justice Department attorneys has hampered or slowed the investigation? Can you explain why your Department has handled the case that way?

Mr. TROTT. Newport News, you are talking about the chronology that you were supplied. I have been advised—and I found myself

going through the documents—that this case is essentially being handled by a U.S. attorney in the eastern district of Virginia. I do not say that as a criticism but simply as an observation. The team that was put together was working out of Richmond was under the direction of the U.S. attorney in Virginia. An assistant U.S. attorney was essentially running the operation.

As I read to you earlier, that five-person team conducted this extensive grand jury investigation and came to a conclusion that there was nothing there so they should not go any farther. At that point, other lawyers in the eastern district came in and they disagreed with their own team. From what I can tell, they then picked up the case and pared it down to a single-item investigation. They took it back and they investigated it further with the grand jury and even at that juncture, came up nothing. The documents are going to reveal, when you see all of them, that then the U.S. attorney's office in the eastern district of Virginia at that point let the case go inactive.

What happened at that juncture was that there was a change in the administration and this administration began to go out, indicating that defense procurement fraud was an important part of our agenda. The U.S. attorney's office in the eastern district of Virginia then prepared this document called Status Report, and I believe you probably have a redacted version of this document. Am I correct?

Mr. KAUFMAN. Mr. Trott, we have a copy of the internal review from the Justice Department on the cases and that review did not include Newport News. I am not sure what you are holding is an unexpurgated copy of that document. You see, we are at a disadvantage because what we had hoped also to find out was exactly what you do have. You tell us you have all of these internal documents. I am assuming you have the documents that we have been told by the Navy were turned over to the GAO. I have not been shown exactly what you have.

Mr. TROTT. In any event, this status report was prepared by the eastern district at the time this case was presented in this form. This case was inactive and the Fraud Division got into it, reviewed it over here in the Department and picked it up and turned it again into an active investigation. The result of that active investigation over here in Washington, the final conclusion arrived at was that there was insufficient evidence of criminal intent to bring a case.

Senator PROXMIRE. Now, let me proceed with these questions to try to find out how much attention, what resources were put on this case, and let us take a look at this case. The U.S. attorney's office in Virginia said that as a result of turnover, the initial investigation was principally conducted in late 1978 and early 1981, between that period, by an assistant U.S. attorney who had no experience in complex criminal investigation. Do you agree or disagree with that?

Mr. TROTT. I do not know the man. I would not know him if he came in here right now and sat down next to me.

Senator PROXMIRE. All right, then let me ask you this: The U.S. Attorney's Office says——

Mr. TROTT. I am sorry, Senator, I was not finished. But I can tell you that was a case that was handled by five people, not just one, at various times, including Navy lawyers. The original report came out from them to the effect that there was insufficient evidence to proceed. In case I do not make myself clear, Senator——

Senator PROXMIRE. The man said that—who had no experience in complex criminal investigation, do you agree or disagree?

Mr. TROTT. Well, I can tell you what his background is, but without actually meeting somebody and going through the ropes with him——

Senator PROXMIRE. Well, would you differ with him?

Mr. TROTT. I do not know. I do not know. But I do know this; I do know that you are correct when you point out that there were serious deficiencies in the 1970's in the way in which the Government reacted to these cases. Those have been addressed—by the way, you are going to get the famous response to the OPMA report also.

Senator PROXMIRE. Well, let me just—you have answered my question when you said you did not know. Let me ask the next question. The U.S. Attorney's Office says there was a meeting at the end of 1979 between his office and the Fraud Section at main Justice, and the Fraud Section made it clear that the Fraud Section or "higher authority within the Department of Justice had decided not to bring a case." In view of the fact that the Department devoted such scanty time to the case, why did it insist on retaining the decisionmaking authority for it? The U.S. Attorney's Office had done most, if not all, of the work. Why were they not allowed to decide whether to prosecute?

Mr. TROTT. Because the case was turned over to the Department of Justice Fraud Section, the eastern district of Virginia washed its hands of the case and the lawyers that were put on the case for the Fraud Section are more experienced than the other lawyers that had been working on it in the eastern district of Virginia, who, by the way, only said that there should be further investigation, never that the case was ready to go for prosecution. The lawyers—when you see the whole package and you get a better view of who the lawyers were who came to the conclusion that these cases were not cases that could be brought in a court of law—when you get the whole picture, I think you will understand what was done there. The Fraud Section——

Senator PROXMIRE. In 1981, the second Fraud Section attorney was withdrawn by main Justice from the case. According to the U.S. Attorney's Office, he "disappeared from the prosecution team." Newly assigned lawyers started working on the case. Do you know who that was?

Mr. TROTT. I do not know.

Senator PROXMIRE. Now, the U.S. Attorney's Office says that about 1981 they established a new team with more experience in criminal cases to take over the case. The new team learned that John Diesel, president of Newport News, had been interviewed by the additional team of prosecutors, off the record, in the presence of his attorney, after he had been informed by substantial letter of the areas of inquiry. The new team was not able to locate any notes of what Diesel said. They learned that others had been interviewed in a similar way. Is that an accepted way to investigate a

criminal case? Are potential targets in an investigation normally told in advance what areas they will be questioned about?

Mr. TROTT. There is also another memo that says that that was not irregular at all under the circumstances, and that is done frequently.

Senator PROXMIRE. Now, it was reported in the New York Times last week, on September 26, that the U.S. attorney in Cleveland was suspended for tipping off somebody who was the target of an investigation in counterfeiting designer clothing and jewelry. Is it not a serious violation of law enforcement standards and perhaps a legal violation to tip off the target of an investigation, the way Mr. Diesel was tipped off?

Mr. TROTT. Senator, I——

Senator PROXMIRE. Or is there a double standard, one for designer clothes cases and one for false shipbuilding?

Mr. TROTT. I hope that is a rhetorical question, Senator, because the answer ought to be obvious. The two are unrelated and have nothing to do with each other at all.

Senator PROXMIRE. Well, in one case the person who made the tip was suspended.

Mr. TROTT. Senator, you are characterizing something with a single concept called tipping off. I do not believe that there was any tipping off in the Newport News investigation. By following these standards of conduct, of course, the logic of your statement——

Senator PROXMIRE. Well, was Diesel tipped off?

Mr. TROTT. I do not know. I doubt it from what I have read. It sounds like it was a standard thing that is frequently done when——

Senator PROXMIRE. Are there not guidelines for prosecutors in this area?

Mr. TROTT. Tipping off?

Senator PROXMIRE. Well, on notifying the targets on what is being investigated.

Mr. TROTT. There are general guidelines. Frequently targets are told exactly what they are being looked into for, and they know already. Besides——

Senator PROXMIRE. Would you supply those guidelines for the record?

Mr. TROTT. I assume there is something in the U.S. attorneys manual. It is very general, but I will get those for you.

Senator PROXMIRE. In March 1981, Newport News asked the Richmond Federal District Court to terminate the investigation. On April 22, Judge Merhige——

Mr. TROTT. I'm sorry, would you repeat that, please?

Senator PROXMIRE. In March 1981, Newport News asked the Richmond Federal District Court to terminate the investigation. Judge Merhige ruled against the shipyard and read the riot act to the Government, accusing them of dragging their feet in the investigation and criticizing the lack of continuity among the Government's legal counsel. Do you agree that as of that time the Government had not handled the investigation in an expeditious and thorough manner, or do you believe the court was wrong in criticizing the Government?

Mr. TROTT. Senator, I am really not in a position to judge. As I pointed out earlier, I was not there at the time, I did not have anything to do with this case at all. I am not trying to distance myself from it. All I have is a bunch of memos that talk about what before was done. I am certain that if you had the original prosecution team in here, they would bristle at the suggestion that they didn't do what they should have been doing. I am sure if you had another group of people in here that disagreed, they would say that the first team didn't get down to business, and if you got the third team in here, the third team would say that the second team didn't get down to business. But I was not there and I cannot tell you.

Senator PROXMIRE. Senator Specter has to leave, so I am going to ask one more question and then I will follow up later on. Are you aware that in April 1981, the U.S. attorney's active grand jury investigation had to be suspended for several months because of a shortage of manpower? Would you explain why main Justice had not by that time assigned a line attorney to help in the investigation?

Mr. TROTT. No; I do not know that information. Senator, if you can specify some of these questions to me in writing, I will try to get that information——

Senator PROXMIRE. Fine. I am just going to say that I hope you will go over this transcript and the questions you could not answer, answer if you can in writing.

Mr. TROTT. And as soon as we can get the full package to you, as I said, we would be willing to sit down and try to fill in these gaps. They will not be filled in by the redacted memos themselves.

Senator SPECTER. Mr. Trott, on the last point that Senator Proxmire was concerned about, it may take a year to get, it probably would if it were handled in the regular course, but would you be willing to cooperate with counsel for the committee in preparing the petition and having it hand-carried by your staff and the counsel for the committee to the appropriate district judge with a request that the judge make as close to an on-the-spot decision as possible?

Mr. TROTT. Senator, as I indicated earlier, I have a copy of this decision—I hope you have a copy of it also—and I have indicated that this will be a friendly lawsuit. We will be guided only by Federal law and by rule 6(e). This morning I asked John C. Keeney, my principal deputy, who was involved in that lawsuit, to get out the files. He was not here last week or we would have gotten them out last week. We have now all the documents so we can work from those documents and get it together, this type of a motion, just as expeditiously as we possibly can. That is the long answer. The short answer is yes.

Senator SPECTER. Well, my question was, Would you cooperate and work with counsel for the committee and hand-carry such a petition to the applicable judge?

Mr. TROTT. That is the short answer—yes.

Senator SPECTER. Well, I think the petition could be drawn before the day is out and hand-carried—or tomorrow.

Mr. TROTT. The one thing that——

Senator SPECTER. You and I have had experience in drawing up complex petitions, but they do not have to recite the history of the world. It could be done during the course of the next 24 hours.

Mr. TROTT. Senator, as I tried to indicate, the Fraud Section has a number of massive investigations going on at the present time, including General Dynamics/Electric Boat. The lawyers who are actively working on those things are also the lawyers who have to work on this. We have a GAO study going, we are trying to redact documents, we are trying to pull the other documents, and now this morning we are going to sit down with them and ask them to do a—what I am telling you is we cannot promise we can do it in 24 hours. What I am promising you is that we will do it without wasting any time and with all deliberate speed.

Senator SPECTER. All right. You are saying that you will make it a priority item for those lawyers notwithstanding their other pressing business?

Mr. TROTT. That's right.

Senator SPECTER. And that it will be done as promptly as possible. My contention is that we can do it in the course of a day.

Senator GRASSLEY. The Senator I hope is cognizant of the history of this whole thing. We asked for information in August and there is some reluctance on my part to accept the judgment that we are going to get right after it. We had to have a hearing to get to where we are today.

Senator SPECTER. Senator Grassley, I am not disagreeing with you, but I obviously am saying that we are where we are. What I was suggesting is to establish a timetable. Mr. Trott said he would put his people right on it. Presently, it is noon on October 1. I have seen a lot of these applications and they can be done in the course of a day. Then, Senator Grassley, if your counsel will hand-carry the matter to the Federal judge, it is different than if it is handled in due course and then it will not get there for several weeks and that judge would handle it like any other matter.

Senator GRASSLEY. Well, are you including in that that we ask guidance on all three cases as well as Newport News? It is my understanding that you are talking about asking them to write it on the Newport News case.

Mr. TROTT. Right now we are doing Newport News. As I said, I think Lockheed can probably be handled without this problem. Again, we have not even been able to get the Lockheed files out. I am failing to impress upon anybody here the enormity of this task and the numbers of documents and the fact that they are dispersed all over the eastern coast.

Senator SPECTER. Well, Mr. Trott, let's take the first case first.

Mr. TROTT. Newport News.

Senator SPECTER. Newport News we will work on expeditiously——

Mr. TROTT. That is right.

Senator SPECTER [continuing]. And get the petition out in 24 hours and it will be hand-carried directly to the judge and he can rule on it on the spot if he can, he will handle it as expeditiously as he can, recognizing that there is a request from the congressional committee, the subcommittee and the Department of Justice.

Mr. TROTT. Senator, if you wish I can give you an update every 24 hours as to exactly where we are in that process, and I will do that.

Senator SPECTER. All right.

Mr. TROTT. Or a member of your staff, we will not bother you with the trivial details.

Senator SPECTER. All right. Now you say as to the other part that you have not had a chance to get it out——

Mr. TROTT. Lockheed.

Senator SPECTER. Lockheed. Why is that, Mr. Trott?

Mr. TROTT. You are talking again about a case that was referred many years ago to the Navy, a case that was declined 5 years ago. We have had our lawyers working on General Dynamics/Electric Boat, including lawyers traveling in Europe, investigators traveling in Europe, we have had lawyers who are closely connected working on Newport News, and it is simply a question of the enormity of the task. I cannot stop all of their investigations and cases and say we are going to find Lockheed.

My people tell me that they are going to get to—are you aware of the parameters of the GAO study that has been responded to? The deadline was October 1, today. I told my people to meet that deadline and they have been using most of their talents and energies to meet that deadline and I am told that they have.

Senator SPECTER. Mr. Trott, I am disposed to be sympathetic to the problems, but you have a department with 700 or 800 attorneys, how many?

Mr. TROTT. There are 700 to 800 people in the Criminal Division alone, but that does not imply that 700 or 800 people are available for this. What I can do is, I will have your same staff person contacted this afternoon and give them an exact status report on when Lockheed can be redacted and we will let you know when that can come about.

Senator SPECTER. Well, Mr. Trott, I would suggest to you two things: Senator Grassley has a point when he says that it has required a hearing to move as far as we have. I know how busy you are, but there are matters of priority and I would say that when you have the press of Senator Grassley and Senator Proxmire on this matter, albeit the same old matter involving Lockheed, that it would be doable, to reassign some attorneys and get at the Lockheed files and try to redact it as it is. You can tell us if somebody is working on it and give us a status report as to what they are doing.

There is the impression, Mr. Trott, that the Department of Justice does not care about what the congressional committee is doing.

Mr. TROTT. I am afraid that that is the impression I am probably responsible for, and it is not true. As I indicated, we have respect for the committee and what it is doing and the positions we have taken have been not inconsistent with the positions we have taken in the past with respect to internal deliberative material.

Senator, you ran a district attorneys office, and I think you can agree with me that if you were to get in a situation in a complex case where your lawyers making judgments get buffeted around, it might interfere with your ability as a district attorney, where the buck stops, to make judgments on——

Senator SPECTER. Mr. Trott, let me come to that. Let us take the beginning point. You have implied that on Lockheed you have not started the review with a view to having something done with the committee's request. That is the fact of the matter, as you have explained yourself, is it not?

Mr. TROTT. Well, I am not sure that they—my lawyers that are doing this tell me that there is going to be no problem with redacting the material, but I cannot tell you honestly under oath what they have done or what they have not done.

Senator SPECTER. Mr. Trott, I would expect you to be able to do that. I would expect you to be able to tell this subcommittee what has been done on the Lockheed files.

Mr. TROTT. I will be able to tell you before the close of today.

Senator SPECTER. Well, we would appreciate that. If you need more attorneys, Justice has a budget something on the nature of $2.3 billion. I know you have a lot of responsibility, but I would say that this crescendo of potential conflict between the Congress and the executive branch, which we all would be well advised not to entertain——

Mr. TROTT. Senator, I am not sure—again, I use that in a technical sense—I am not sure that the documents can be redacted by any old lawyer. I think you have to have people looking for grand jury material who understand the grand jury investigation, otherwise—grand jury material does not stick right out and say "grand jury material."

Senator SPECTER. Mr. Trott, all of your answers have been responsive except to my questions. I am just saying to you to get a lawyer who understands this among your array of talent and give us a report concerning when you can get an answer to the subcommittee.

Mr. TROTT. For the third time, I will tell you that before the day is over——

Senator SPECTER. That is fine. I understand that it requires some substantial talent. Mr. Trott, let me come to a question that Senator Proxmire raised which is some concern to me. I have read in the media that the Attorney General had taken himself off the case. Can you give us what really happened there? Was that news account correct? Did Senator Proxmire accurately characterize the problem? What did happen with the Attorney General's participation in this matter?

Mr. TROTT. Senator, I am advised that because of previous law work done by the Attorney General's firm before he became Attorney General, it was his belief that it would be a conflict of interest for him to have anything to do with the General Dynamics investigation or anything at all having to do with General Dynamics.

Senator SPECTER. Well, that would be a perfectly good reason.

Mr. TROTT. And that is——

Senator SPECTER. You do not suggest that he made a speech——

Mr. TROTT. Oh, no. That is why he recused himself from this case. There is a time-honored position that we have in the Department of Justice, when we first——

Senator SPECTER. You do not have to go over that with me. I understand. I think it would be useful for the subcommittee to get the details of what work the Attorney General or his firm had done for

that particular party which led to the practical basis for staying out of the case.

Senator GRASSLEY. Are you requesting that we ask for that information?

Senator SPECTER. Yes.

Senator GRASSLEY. I will be glad to do that.

Mr. TROTT. Senator, may I ask that that be done in writing directly to the Attorney General? There may be an attorney-client privilege involved in this, I am not sure. I would be loathe to carry that request back and I would request that that be done in writing.

Senator GRASSLEY. OK.

Senator SPECTER. Well, I think it may be that Attorney General Smith has been done a disservice by what has been in the media if there is a genuine conflict here. You do not have to pry into something that involves what any client has said to the Attorney General to get into the attorney-client issue. Just the fact that representation is sufficient that it would preclude him from participating in this situation.

Mr. TROTT. Yes; it is.

Senator SPECTER. Let me ask you, if you can in a direct way, without breaching confidence, tell us why it is that when a staff recommendation says that it is clear beyond doubt that an individual has been involved in not only fraud and false data but their preparation has been criminal, is it possible to indict on the strength of that?

Mr. TROTT. Yes; it is.

Senator SPECTER. Can you tell me why the superiors did not on the strength of that seek a prosecution?

Mr. TROTT. Well, I do not believe that it is fair to say that prosecution was the conclusion. I am advised that it was the belief of the eastern district that there was something there someplace and further investigation was called for. It was not stated in the memo, as I read them, that on the basis of the investigation that a prosecution ought to be——

Senator SPECTER. Have you reviewed these files and determined that to be the case, because on the face of it it looks like this was the case. My question to you is, Do you know enough about the details to say that this memo was only asking for more investigation?

Mr. TROTT. I am a victim of hearsay, because I was not there, but I have been told that the recommendation was for further investigation. There was a series of meetings back and forth and the fraud section lawyers who worked on this case came to the conclusion, as did the early lawyers from the eastern district of Virginia, that the evidence was not there. There was a series of meetings, there was give and take back and forth and the eastern district lawyers were told, "You say that but what is the evidence?" I am told that they had none and could not come up with any to fill in the elements of the offenses that would be necessary for prosecution.

Mr. SPECTER. Mr. Trott, have you had an opportunity to review the files? This is hearsay and is fine as long as there is thorough analysis. Every report is hearsay, but that is different from what someone may say in an offhand manner. Have you had an opportu-

nity to review the files and come to your own judgment that prosecution was not warranted?

Mr. TROTT. Senator, I have had the opportunity to read all of the deliberative memoranda that are involved in this case. I have had the opportunity to talk with the lawyers who made the final decision in the Fraud Section. I have not had an opportunity to talk with the lawyers in the eastern district, either the interim team who said there should be further investigation or the original team that said it should be declined in 1978. I have not had a chance to read the 6,000 pages of grand jury transcript or look at the documents, but I have come to the conclusion that the final professional decision that was rendered in this case that it should not go forward was a professional decision based on evidentiary deficiencies in the case. That is the way it appears to me in the limited contact that I have had with the files.

Senator SPECTER. When you say evidentiary deficiencies, are you saying that as a matter of law the case would not have gotten to the jury?

Mr. TROTT. It appears to have been the judgment of the lawyers who made the final decision that that is probably the case. There was a lack of evidence showing criminal intent to cheat and defraud.

Senator SPECTER. But the issue of criminal intent to cheat and defraud is a matter of inference, that is something which arises as an inference from the facts. You said earlier that you could not persuade so many lawyers, you could not persuade 12 jurors—I would raise the question that if there was sufficient evidence to get to a jury then it may well be that that is the kind of a case that ought to be pursued, even though it might not be as open and shut as the prosecutor would have liked. There are varying standards where that type of case ought to be prosecuted, and I ask you the question of whether there would be compulsory dismissal for insufficient evidence to even get to a jury, which then would take us beyond the realm of prosecution, as opposed to a case that would get to the jury, then it would be up to the jury because there may be very good reasons in cases like this in the face of doubt by the prosecutor to take a matter to the jury and let them resolve it.

Mr. TROTT. There is extremely good reasons to do that, I agree. You and I both in the past, as local prosecutors, have done exactly that, where there were questions that ought to be resolved, we let the machinery resolve it. It is my belief, in talking with the lawyers who made the final decision that there was a paucity of evidence to establish criminal intent of such a variety that it would have made going forth with such a case an abuse of prosecutorial discretion, I guess—and I have never asked them the question in these terms—that that means that they feel it would not have gotten to a jury, but I believe that is probably what they would tell you.

Once again, I would ask you to withhold final judgment on this until you have seen those parts of their memos that will be made available to you, redacted of course, to reflect on why they did what they did.

Senator SPECTER. Mr. Trott, just one final question. As it is in the nature and kind of resources that you have, the Department of

Justice is vastly understaffed. Virtually every prosecutor's office is. And there is some consideration being given in some quarters, myself included, to a proposal which would authorize the Department of Justice to employ special counsel in complex cases involving fraud or involving organized crime. As this shows, there is constant turnover which might go forward on the surface, I do not know, and there is a lack of experience in terms of who can be persuaded or induced to stay in the prosecutor's office over a long period of time.

The English have a system, as you doubtless know, where when they have an important case, they have special counsel come in, heavy boys, comparable to the kinds of defense teams which are available for the defense, that this case may be the kind of approach we need for that kind of greater maturity, so it may be that if you have some prosecutors who think that the case can go forward—if I had a prosecutor who really thought he had a good case and I had some questions about it, I would be very much disposed as district attorney to let the assistant carry the sense of the case forward because he may well be able to persuade a jury, have more sense and more feel for the details and can go forward.

Mr. TROTT. Senator, what you said is absolutely correct, and that is why the Attorney General and Secretary Weinberger created a Defense Procurement Fraud Unit. As you know, prosecutors come and go and one of the biggest problems any prosecution agency has is developing an expertise only to see that person or those persons leave a prosecution agency to go into private practice for greener financial pastures. Recognizing that this happens in the U.S. Attorney's Office and even in the Fraud Section, we created the special Defense Procurement Fraud Unit. It is really very, very unique. Recognizing that these areas are not areas in which anybody can get up to speed overnight, we said we are going to sit down and we are going to create a continuous presence in this area with 11 lawyers from all the affected agencies who will not have to go back to school to learn what these things are all about when a case comes through the door. We have taken that approach in this complex area.

Senator SPECTER. I have a sense that you might be well advised to have some more help and that is something that the Judiciary Committee would like to take a look at.

Mr. TROTT. We would be delighted to discuss it with you and, Senator, may I repeat my invitation to you also to come over and tour the unit. I know you are very interested in this area and we would be delighted to show you exactly who these people are and what they are doing and how it is set up to receive these claims and the seminars we are now putting on for U.S. attorneys.

Senator SPECTER. I will be looking forward to getting the 6,000 pages of notes and testimony.

Senator GRASSLEY. Being suspicious, I wonder why Secretary Weinberger asked me to come over and view the aspects of the Defense Department. Let me say——

Senator SPECTER. It will not be a change of temperament to be suspicious.

Senator GRASSLEY. Before you go, I would simply like to say I know you have been in Washington long enough and I have been

in Washington long enough to recognize what I refer to as mañana. We have been getting excuses for too long and we are not going to accept excuses. What we want is to just get these documents, from my standpoint. None of our deadlines have been met so far, none of them. In fact, we have had even snotty verbal remarks that Mr. Trott will pay attention only to his deadlines, not to ours, so you see what we are dealing with.

Mr. Kaufman and then Senator Proxmire.

Mr. KAUFMAN. Thank you, Mr. Chairman. If I may just speak for the record that the reference Senator Proxmire made to Attorney General Smith's appearance at the General Dynamics shipyard had to do with his participation in a ship launching taking place at the shipyard, and he was therefore questioning whether the Justice Department under the circumstances where the Attorney General takes part in a ship launching of a company that is under investigation can independently pursue that investigation.

Second, Senator Specter also quoted from a 1981 report from the U.S. Attorney's Office which appears to recommend prosecution, which concluded that there were criminal offenses in the case, and Senator Specter was discussing that with Mr. Trott.

I would like to state for the record again that Senator Proxmire quoted a later document dated October 5, 1983, that was signed by the U.S. attorney in Virginia as well as several other assistant attorneys, which stated "We still are convinced that there is a prosecutable case against the company and that in fact could be put together before October 5, 1983."

Finally, Mr. Chairman, I would like to state for the record that the Federal district court case that Mr. Trott referred to which earlier had been asked to provide official guidance of the Justice Department in another matter, was a case involving the Vesco investigation, and in that case, the Senate Judiciary Committee had requested certain documents from the Department of Justice conducting its investigation of Mr. Vesco. The Department of Justice rejected all of the requests for documents requested before going to the Federal district court and asking for judicial guidance.

Now, the Senate Judiciary Committee began its request for documents in the spring of 1980. The district court announced its decision on March 9, 1981, about 1 year later. But the most important thing about this decision is that the district court ruled that the Justice Department should redact the Department of Justice memoranda being requested by the committee and turn those redacted documents over to the committee. It is therefore questionable at this point in Senator Proxmire's mind and my own what the purpose would be of going back to the Federal district court again to seek guidance on a matter that has already been determined and which Mr. Trott appears to acknowledge still stands as good law today.

Now, if I can, Mr. Chairman, ask a few questions before Senator Proxmire gets back——

Mr. TROTT. May I respond quickly to the last two statements first, Mr. Kaufman, with your permission?

Mr. KAUFMAN. Certainly.

Mr. TROTT. I am advised—No. 1, I am advised—and I have not had a chance to look into this—that the court decision came down

only 3½ months after filing. No. 2, that copy of the decision that I gave to you last week by messenger so that you could examine it; No. 3, we are not saying that we have some position that says you cannot redact memos. Let me clarify that. I am sorry if I have not made that clear.

My lawyers are telling me that there are some areas that they do not know whether they can give to you or not because of 6(e). Those are the areas that we want to question, not the other. We agree to the other. It was my idea, but the—why are you shaking your head?

Mr. KAUFMAN. Because I do not think you understand the point, Mr. Trott. The same point was made by the Justice Department before the Federal district court in 1980 and the court told the Justice Department then, you take those documents and redact them, you take out the grand jury material and then turn the documents over to the committee.

Mr. TROTT. Mr. Kaufman, I beg to differ. I do understand the point. My point is that the lawyers tell me that there is some material in there that they would like to turn over to you but they want to make sure by consulting with the court that they are not going to be held responsible for a 6(e) violation. Have you ever redacted a 6(e) document? It is not that easy.

Mr. KAUFMAN. The court made it clear in the *Vesco* case that it was the responsibility of the Justice Department to redact the documents and turn them over to the committee. The court did not undertake to do that job for the Justice Department. The court said you do it, you turn the documents over to the committee and then give me copies of the unredacted documents and the redacted documents.

Senator GRASSLEY. His point is that the decision has already been made.

Mr. TROTT. And my point is that the decision has already been made but that we have material that is in memos that came out of grand juries and our lawyers tell me that the Federal court has control over this information and we had better go get a court ruling on whether this is 6(e) or not because they are not sure.

Mr. KAUFMAN. Well, Mr. Trott, why did you not turn the documents over to the committee redacted, those that do not have that special problem, and then go to court with the ones that you do have a special problem with? Or do you have the same problem with every document?

Mr. TROTT. I guess we can talk about that possibility, but I am not sure you want to get two sets of documents, one redacted greater than the other.

Mr. KAUFMAN. Mr. Trott, I think what we are saying is that it appears that you are trying to do before the district court what the district court has already done once.

Mr. TROTT. No.

Senator GRASSLEY. It appears—that is the way it appears to me. Go ahead.

Mr. KAUFMAN. If I could pick up on the questions that Senator Proxmire left before going over to the floor, the U.S. Attorney's Office states that by late November 1981, complete responsibility for the staffing and the prosecution of the Newport News case as

well as for an earlier case involving Litton had "by default shifted entirely to the U.S. Attorney's Office." In other words just at the point where we had assumed responsibility for the case originally, had shifted by default to the U.S. Attorney's Office. Is that correct?

Mr. TROTT. That is what the memo says. I don't know whether it is or not. I do not know how the decision was made.

Mr. KAUFMAN. In November 1981, the U.S. Attorney's Office, together with an official in the Criminal Division of the Justice Department, prepared a 110-page status report which concluded what Senator Proxmire has already quoted, and I think Senator Specter has quoted, that "It is clear beyond cavil that the individual claims analyzed above are not only false and without legal merit, but that their preparation was purposeful and criminal."

The report also criticized the Justice Department's handling of the case because "almost as soon as the main Justice attorney got deeper involved in the investigation, he or she would disappear to work on other cases." What did your division, the Criminal Division, do when it got that report? What was the reaction to that report?

Mr. TROTT. I do not know.

Mr. KAUFMAN. This was a 1981 report sent to your division, the Criminal Division.

Mr. TROTT. I was in California at the time. I do not know.

Mr. KAUFMAN. Is it correct that the status report urged that the investigation be continued and that the Justice Department assign more staff resources to the U.S. Attorney's Office? Do you know if that is a true statement?

Mr. TROTT. I believe it is, but I have to go through and consult the documents to make sure that is the case. As I say, when you get all the documents and familiarize yourself, you will have most of the answers to these questions.

Mr. KAUFMAN. In January 1982, the Fraud Section of your division in the Justice Department removed the prosecution team from the case and reassumed total responsibility for the investigation.

Mr. TROTT. What is the time that you are referring to?

Mr. KAUFMAN. The U.S. attorneys prosecution team in the eastern division of Virginia. In January 1982----

Mr. TROTT. I am not sure that is accurate. I have been told that is not accurate.

Mr. KAUFMAN. According to the document, that is what the U.S. Attorney's Office said.

Mr. TROTT. And I have been told that is not accurate.

Mr. KAUFMAN. You are saying that the Justice Department did not assume total responsibility for the case in January 1982 in a meeting which took place between members of the U.S. Attorney's Office for the eastern district of Virginia and members of the Criminal Division of Justice?

Mr. TROTT. No, I am saying that the eastern district of Virginia, as far as I can tell, was not removed because to my knowledge, based on what I have been able to piece together, they were never involved in it in the first place. The case came over to the Fraud Section and the only reason the eastern district was involved was because they had it in the first place and there were a series of meetings back and forth to make sure that we were not missing

something that they had seen or that our judgment on the case was sound or vice versa. It is not my understanding that they were on the case at that point and removed. It is my understanding that the case had been turned over to the Fraud Section before that. I may be mistaken, but that is what I believe.

Mr. KAUFMAN. So then you are acknowledging that the Fraud Section had assumed responsibility but you are not sure whether the U.S. Attorney's Office had been removed from the case. Are you acknowledging that the Fraud Section had responsibility?

Mr. TROTT. On Newport News?

Mr. KAUFMAN. Yes.

Mr. TROTT. Yes, the final decision on this case was made by the Fraud Section of the Criminal Division, in consultation with other——

Mr. KAUFMAN. They had assumed responsibility for the investigation?

Mr. TROTT. I am not sure for the investigation, but for the case.

Mr. KAUFMAN. Well, we are talking about the investigation. The point made earlier was that the Justice Department was going to let the U.S. Attorney's Office know and the final decision will be made by Justice, but the responsibility for doing the work on the investigation was left in the U.S. Attorney's Office. Now I am asking whether in January 1982 the Justice Department took responsibility for the investigation.

Mr. TROTT. Mr. Kaufman, I just might make a mistake and mislead you by answering that complex question. Again, you can write these questions down, we will be able to go back to all the lawyers that were involved and recreate what happened then. If I was there, maybe I could give you a better idea as to exactly how it happened, but I was not. I am dealing from files, I am dealing with conversations of other people and I am afraid I am just going to mislead you if I try to repeat to you my understanding of precise cuts like that.

Mr. KAUFMAN. Mr. Trott, the transcript of this hearing will be forwarded to you and you will have all the questions at that point that were read into the record.

Mr. TROTT. I am assuming then that the request, this is a formal request that we will go back with the transcript and try to answer the questions?

Mr. KAUFMAN. That is what Senator Proxmire asked earlier and I am saying that the usual procedure in cases where witnesses do not answer questions orally——

Mr. TROTT. And you want those questions answered in writing to Senator Proxmire?

Mr. KAUFMAN. Well, they would be submitted to the two subcommittees.

According to the U.S. Attorney's Office, after the Fraud Section of Justice assumed total responsibility for the investigation in January 1982, "Nothing happened for several months." In other words, there was no further action on the investigation for several months after January 1982. Is that correct?

Mr. TROTT. I do not know. Again, you are reading from one memo out of many memos, and I would ask you to examine all the memos of the people that were involved in this. The eastern dis-

trict may not have known what was going on in the Fraud Section. I just do not know.

Mr. KAUFMAN. Do you know whether in late spring of 1982 the Justice Department assigned a single attorney from the Criminal Division to review the status of the investigation and to assess the Virginia U.S. attorney's conclusions?

Mr. TROTT. This is 1982?

Mr. KAUFMAN. Yes, sir.

Mr. TROTT. Can you give me the date again?

Mr. KAUFMAN. In the spring of 1982. We would like to know whether that occurred, if so, what the date was and when the review began.

Mr. TROTT. Have you seen the GAO submission?

Mr. KAUFMAN. No, sir.

Mr. TROTT. The spring of 1982?

Mr. KAUFMAN. Yes, sir.

Mr. TROTT. If you could give me the name, I might be able to answer. In the spring of 1981 is——

Mr. KAUFMAN. We will be glad to, but the name is not in the redacted document and it is one of the documents that is a result of the review of the Justice Department——

Mr. TROTT. Can you give me the date again?

Mr. KAUFMAN. The spring of 1982.

Mr. TROTT. Can you give me the date of the document that says spring of 1982?

Mr. KAUFMAN. The date on the document——

Mr. TROTT. August 5, 1982, is that the date of the document?

Mr. KAUFMAN. Yes, the document which resulted from that record was completed and signed and delivered on August 5, 1982——

Mr. TROTT. Yes. That——

Mr. KAUFMAN [continuing]. The review of the recommendations that the U.S. attorney had made in November 1981.

Mr. TROTT. Yes. You have that document. That is right.

Mr. KAUFMAN. What we are asking is the basis for the review.

Mr. TROTT. Again, I do not know. All I know is that the document is dated August 5, 1982.

Mr. KAUFMAN. We would also like you to tell us for the record why a single attorney was assigned to review a 110-page report from the U.S. Attorney's Office, summarizing the experience of several years of investigation and making recommendations and drawing conclusions about the case and requesting further resources to be assigned by the Justice Department at that time.

Mr. TROTT. I am not sure that I can tell you because I do not know who that person was.

Mr. KAUFMAN. Would you also indicate for the record if it is true that this attorney was assigned to do that review, that there was quite a delay in making that assignment, since the U.S. attorney's report and recommendations had come to the Justice Department in November 1981? And why did 4, 5, or 6 months go by before you assigned somebody to review what the U.S. attorney recommended?

Mr. TROTT. Mr. Kaufman, that assumes two things that I told you I do not have any information on, No. 1, that the assignment

was in the spring and, No. 2, that there was a delay. I cannot answer the question.

Senator PROXMIRE. I want to apologize to the chairman for being absent. I had to go to the floor to make a statement and I want to thank the chairman of the committee and also Counsel Kaufman. He has done an awful lot of work on this and a lot of very good work.

Mr. Trott, I am very impressed that you are still standing up. Is it not time to rest your feet and give your back a workout?

Mr. TROTT. No, thank you, Senator. My feet are fine.

Senator PROXMIRE. You are not only extraordinarily articulate, but you are high level. Is it not correct that the review ordered by Justice was completed on August 5, 1982?

Mr. TROTT. Yes.

Senator PROXMIRE. And the conclusions were almost identical to those in November 1981 in the report of the U.S. attorney?

Mr. TROTT. No.

Senator PROXMIRE. They were not? How did they differ?

Mr. TROTT. Well, it is my impression from reading the memos that there was a different focus that was added by the August 5, 1982 memo, regarding what investigation track should go from there. This attorney seemed to have just a slightly different twist on it. They were not identical at all. But the overall——

Senator PROXMIRE. There was a slightly different twist on it. They are almost identical. You said they had a slightly different twist.

Mr. TROTT. I am sorry, I did not hear the word "almost." What happened here was that Mr.—that lawyer essentially agreed with the attorneys from the eastern district that the investigation ought to proceed, in that respect you are right.

Senator PROXMIRE. So the review of it ends up urging proceeding with the case. Now, I want to read what the August 5 review concluded about what is known as Parkinson's Law: "I believe that the bold assertions of law in the context of the shipbuilding industry without the support of any empirical studies is outrageous and fraudulent."

Concerning another part of the handling by the Justice Department, "This claim is ridiculous." Do you agree that the August 5 review essentially agreed with the 1981 report of the U.S. attorney?

Mr. TROTT. You are asking me for a gross characterization and I am really not able to do that.

Senator PROXMIRE. They are your documents. You should be able to do that because your job is to study these.

Mr. TROTT. It never ever crossed my mind to compare the two and ask whether they essentially agree or not.

Senator PROXMIRE. Didn't the attorney after the review note that because of the passage of time, the statute of limitations considerations were becoming urgent? The statute of limitations considerations——

Mr. TROTT. Senator, the report currently as you have it as redacted speaks for itself and I would agree that the report says anything that you read from it.

Senator PROXMIRE. Is it not true that 8 months had elapsed in November 1982, and there had been no progress in the investigation?

Mr. TROTT. I do not believe that is the case. I do believe there had been some progress, but obviously not in the direction which you would like.

Senator PROXMIRE. Well, what progress?

Mr. TROTT. The case was finally concluded. You had an open matter and it was finally concluded and that at least in Webster's is the——

Senator PROXMIRE. This had been concluded?

Mr. TROTT. No; I am sorry——

Senator PROXMIRE. Well, that was the question.

Mr. TROTT. Well, I think it was progress to have additional review of the case and another memo presented.

Senator PROXMIRE. But no further investigation, no work on the case, no progress?

Mr. TROTT. I am not sure whether there was investigation or not. Probably there was not. The case when we got it from the eastern district of Virginia was absolutely dead and the issue was whether or not there ought to be further investigation.

Senator PROXMIRE. Can you explain why the Justice Department rejected the conclusions and review of the U.S. attorney's report?

Mr. TROTT. Because they were without foundation and not supported by the evidence or the law.

Senator PROXMIRE. The Justice Department attorney wrote the August 5 report and said since September 24, 1982, memo, that he been directed to "revitalize the Newport News investigation." He then proceeded to outline the work plan for 1982. What happened to the work plan to revitalize the investigation in 1982? Did you reject it? If so, when and why?

Mr. TROTT. I am not positive and I will answer that in writing.

Senator PROXMIRE. The conclusions in the August 5 review were rejected by some higher authority in Justice. On November 17, 1982, the author of the August 5 review vigorously dissented with the decision to close the investigation. What happened between September 1982 and November 1982, those 2 months, to cause the strange turn of events? Was there another review or study between those two dates?

Mr. TROTT. Can you give me those dates again?

Senator PROXMIRE. September 1982 and November 1982.

Mr. TROTT. Do you mean September 24, 1982, memo?

Senator PROXMIRE. That is right.

Mr. TROTT. And the November——

Senator PROXMIRE. And November 1982.

Mr. TROTT. There may have been some meetings in there, but I am not sure. I cannot recreate them.

Senator PROXMIRE. I understand Lowell Jensen made the final decision to terminate the investigation in August 1983. Did you discuss this case with Mr. Jensen and can you explain his action?

Mr. TROTT. I have discussed it with Mr. Jensen and I am advised that the case, the final decision was made by Mr. Jensen, based upon the recommendation of the senior people in the fraud section,

the lack of evidence, to support the elements of any Federal criminal charges.

Senator PROXMIRE. Do you dispute the conclusion by the U.S. attorney in the report of May 1983, that "The investigation is characterized by a series of false starts, interruptions, delays, obstruction through the patina of institutional nonaccountability and negligence"?

Mr. TROTT. Senator, I am not sure that I am personally in a position to be able to give you that sort of characterization. That is what was said in the memo, but I suspect that other people in the Department would feel very differently about that. It is true that——

Senator PROXMIRE. It is your Department. I want your judgment.

Mr. TROTT. I am unable to give you a judgment on that, Senator. I will not hazard a judgment that I am not sure of. I was not around then. There is no question about it, as I said earlier, the Department was not coping very well with these cases and that is why the Defense Procurement Fraud Unit was created.

Senator PROXMIRE. Now, this is not ancient history. This is a very, very serious allegation. The investigation has been characterized by a series of false starts, interruptions, delays, obstruction through the patina of institutional nonaccountability and negligence. That is May 1983. It is not ancient history.

Mr. TROTT. May 1983, referring all the way back to February 1978.

Senator PROXMIRE. We are referring to the whole case. You reviewed this case. Do you acknowledge that while the statute of limitations may have run on the violation of the False Claims Act, it may not have run on the conspiracy to defraud the Government, and violations may have not run on any perjury or obstruction of justice violations?

Mr. TROTT. You gave me three things there. Obviously, it has not run on perjury or obstruction if the perjury or obstruction is within the statute. I am not sure whether or not it has run on conspiracy because that would require an action within the statute. I do not believe there are any in the statute.

Mr. KAUFMAN. Would you expand on that response for the record, Mr. Trott, after reviewing the documents that we have released today and the discussion of that matter?

Mr. TROTT. Whether or not the statute of limitations has expired on Newport News with respect to any conspiracy?

Mr. KAUFMAN. Yes, sir.

Mr. TROTT. Yes.

Senator PROXMIRE. Now, Mr. Trott, would you say that the investigation of General Dynamics case was handled with the same degree, a greater degree or a lesser degree as the Newport News case?

Mr. TROTT. [No response.]

Senator PROXMIRE. Mr. Trott, maybe you would like to take these back to your office. I asked you a question and if you prefer I will repeat it again. Would you say the investigation of the General Dynamics case was handled with the same degree, a greater degree or a lesser degree of competency as the Newport News case?

Mr. TROTT. It is awfully hard for me to make that kind of a——

Senator PROXMIRE. Surely, you are on the spot. I am asking you to go back and look it over and give it to us in writing.

Mr. TROTT. Certainly there were fewer people involved in the General Dynamics case. To my knowledge, there were no false starts and there was a continuity of personnel, both investigators and prosecutors, so certainly in an abstract sense, I think we have learned a lesson from Lockheed that we can apply to General Dynamics. That is my best judgment, standing at a distance.

Senator PROXMIRE. Did Lowell Jensen ultimately make the final decision on the General Dynamics case?

Mr. TROTT. I believe so.

Senator PROXMIRE. Have you discussed the General Dynamics case with him?

Mr. TROTT. Yes.

Senator PROXMIRE. What did you discuss?

Mr. TROTT. In the General Dynamics case?

Senator PROXMIRE. Yes, sir.

Mr. TROTT. I guess I first started discussing the General Dynamics case with Mr. Jensen 13 months ago when Takis Veliotis came to our attention in the Frigitemp case up in New York. Mr. Veliotis was indicted in the southern district of New York for kickbacks. Not knowing anything at all about Mr. Veliotis or General Dynamics or anything, I remember talking to Mr. Jensen about it, to find out what he knew and who to talk to. I then got into the Fraud Section and talked with the Fraud Section chief and deputy chief about the case and got also a copy of the OPMA report and, I remember discussing that with Mr. Jensen and asking why we had done the OPMA report. Mr. Jensen told me that it was clear to him that we could do better than we had been doing, that the OPMA report was designed to discuss these cases and analyze them so we would know how to go forward in the future and cutout some of the foulups.

On and off, I continued to discuss it with Mr. Jensen over the next 8, 9, 10 months our continuing attempts to secure the cooperation of Mr. Veliotis and I had also talked with him about generally—this is in a very general sense—what happened to the General Dynamics case and was told that there was never any evidence that could be uncovered that would fill the element of the intent that is required for Federal criminal prosecution. That is generally the kinds of things that I have talked with him about.

Senator PROXMIRE. My last question is this—incidentally, I want to express admiration—Mr. Trott and I went to the same high school and we are very proud of that school and, although we disagree on some things, obviously I have great respect for your ability and your articulateness and obviously you learned well in school.

Mr. TROTT. That is correct, Senator, I enjoyed that experience very much.

Senator PROXMIRE. Now, the Attorney General has removed himself from the General Dynamics case but attended a ship launching ceremony, as I referred to earlier. Lowell Jensen, your immediate superior, made a decision to terminate the General Dynamics case and the Newport News investigation. Your attorneys under you recommended the termination of the investigation. What assurance

can you give us that you have the independence and the capacity to make an objective decision about prosecuting or not prosecuting?

Mr. TROTT. First, Senator, with all due respect to your initial characterization of the Attorney General's handling of the case, again I would repeat, I am advised that the Attorney General did not remove himself from the case so that he could "go to a ship launching ceremony." I am advised that the Attorney General, under the procedures that are in the Code of General Regulations and specified in the rules of the Department of Justice, I believe that because of his prior association in a law practice with General Dynamics, that it would create a conflict, at least the appearance of a conflict of interest for him to be making any judgments on that.

Senator PROXMIRE. That is exactly why he should not have gone to the ship launching ceremony. That is about as conspicuous as possible. I got all kinds of calls about that. I did not make any comment on it, as I recall, but it seems to me now that that showed an unusual insensitivity and it looks like a conflict of interest.

Mr. TROTT. Senator, I am addressing myself only to your statement that he recused himself, so that he could go to the launching. That is not exactly how it happened. The only thing I can tell you——

Senator PROXMIRE. He just should have refused to go.

Mr. TROTT. I understand that the invitation came from the Navy, not the company. In any event, what assurance can I give you? Obviously, I could not give Senator Grassley any assurance, because I have not impressed him at all today. The only thing I can tell you is that I have been in this business for 20 years and I know only how to do one thing. Some people may disagree with me or they agree with me. I call it the way I see it and if there is evidence there that somebody has broken the law and we have a case that can be brought into court, we will take it into court. By the same token, I feel it is the prerogative of the prosecutor, indeed the responsibility of the prosecutor not to throw cases against people in court just to stay out of the heat and defer to some other position down the line. So what can I tell you? I have been in this business for 20 years and I will be in it for maybe 20 more years if I am lucky.

Furthermore, you have career lawyers in the Department of Justice and you will be able to see all of these documents. And if you ask me are there political influences being brought to bear, I will defy you in your examination of these memos to find any influence other than prosecutors, working hard to analyze the evidence and the law. And that is the way it is done in the Department of Justice, and it is a position of which I am proud.

Mr. KAUFMAN. Mr. Trott, you have offered to allow the staff to prepare the documents. Would you also allow the committee staff to interview attorneys who worked on the case and the FBI agents who worked on these cases.

Mr. TROTT. Mr. Kaufman and Senator Proxmire, I am not empowered to make that statement to you today. I may be Assistant Attorney General in charge of the Criminal Division, but I report to superiors and that request would have to be presented to them. And rather than using the transcript and all, if that is a request

that the committee would like to make, I would ask that it be addressed in writing to the Attorney General.

Senator PROXMIRE. Thank you very much, Mr. Trott.

I have a closing statement I would like to make before we conclude. We began this inquiry because of an apparent pattern in the way the Justice Department has managed the criminal investigation of a group of massive Navy shipbuilding cost overruns. Each case has been characterized by delays, and unusual staff turnover. Each case was under investigation for long periods of time, 3½ to 5 years. The effect of these protracted investigations was to close off congressional inquiry.

It is understandable that criminal investigations need to be conducted in secrecy, but one must wonder about the integrity of a Federal investigation that takes years to complete and then is terminate virtually without explanation.

The Department's own internal review of three of the investigations indicate serious mismanagement by the Government. The Newport News case was not included in the review. I believe that today's hearings suggest that it has been one of the most mismanaged cases of all.

We cannot know the full extent of mismanagement until we get all the relevant information about the Lockheed, General Dynamics, and Newport News investigations. However, to obtain that information requires a review of the Justice Department's actions. The Justice Department, Mr. Trott in particular, has been most uncooperative so far. His replies to our letters have been delayed and unresponsive. The requests for information have been denied. The requests for documents have been rejected.

The General Accounting Office's request for access to the Department's files has so far been denied, as have the requests to interview the attorneys and FBI agents who worked on these cases. The Justice Department seems to be hunkering down and stonewalling our efforts to become informed and perform our jobs. An offer to seek judicial guidance seems to be a last minute delaying tactic.

My conclusion is that the Justice Department's excuse for not cooperating do not hold water. Mr. Trott and his colleagues have been most unreasonable.

Mr. TROTT. Senator Grassley, may I add a couple of things? First of all, I would like to ask, how are we to find out the identity of the person with whom we will work to make this motion to the court to make these documents available to you?

I was going to add, we will do it unilaterally, if you wish.

Senator GRASSLEY. We would suggest that Justice try to respond to our request and after that we will make a decision.

Mr. TROTT. Thank you, Senator. I further want to say, that you referred to some snide remarks that were made by me. I think I simply ought to apologize to you in that respect, and tell you that the remarks were neither intended to be snide and in my judgment were not snide.

You refer I think to a conversation I had with your secretary when she called up and wanted to know where the documents were. No. 1, I thought I was going out of my way to talk with your secretary rather than defer to somebody who did not know anything about it. What I said was when I was asked why were the

documents not up here on August 23, I said with all due respect your deadline, that the 23d was not ours. That was not intended to be a snide remark. If you took it as such or a slur against your office, I have no hesitancy to apologize to you personally or to the office that you hold.

Senator GRASSLEY. With all due respect, I would like to introduce you to the staff person you made the snide remark to. You have said——

Mr. TROTT. I apologize to her then, if she feels it is necessary.

Senator GRASSLEY. You have said you will allow us access to information. This is a contradiction of your first response to our request. Even now your offer seems to be in the future tense. I have yet to see one piece of paper and I have my doubts as to when I will.

You ask what will impress me. I would say documents and evidence is what impresses me. In the *Vesco* decision, the court determined what was and what was not 6(e) material. The court ordered DOJ to turn over the redacted documents within 30 days. And it also ordered DOJ to turn over those documents to the court. The issue of our right to documents has already been decided as far as I am concerned.

I would like to make it clear that I would have been more than happy to meet with you prior to this hearing if we were going to receive documents. That was not the case. As your letter 2 days ago indicated, you wanted to discuss the reasons why we could not get documents. Now, I am not interested in excuses but am interested in results.

The term "justice" implies commitment to generally accepted standards of right and wrong. This includes the administering of deserved punishment or reward.

Many times, the process of justice is selective. As Johnathan Swift once wrote, "Laws are like cobwebs which may catch small flies but let hornets and wasps through."

I would suggest it is often not the laws themselves that are like cobwebs, but the administering of laws.

It is the responsibility of our Department of Justice to assure the just administering of laws. And that means as it applies to hornets and wasps, as well as small flies.

It is not at all clear, based on the available evidence, that the Department is fulfilling its responsibility in that regard. I truly hope this is not the case. But we have a responsibility to find out.

As indicated, if the Department refused to produce the requested documents, they would be subpoenaed. I am now delivering that subpoena and I suggest to you, Mr. Trott, and to the Department, that you do everything in your power to comply with this subpoena. If the public interest is to truly be served, we must get all the facts out on the table. For oversight without information cannot be performed, and real justice will not be served.

The hearing is adjourned.

[Whereupon, at 1 p.m., the subcommittees were adjourned.]

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